NH

108-76

Supreme Court of the U. S.

THE STATE OF NEW HAMPSHIRE
AG'ST
THE STATE OF LOUISIANA, *et al.*
Original, No. 2.

Stipulated that the above cause may be set for final hearing in the month of March, 1882, on such day as to the court may seem best.

MASON W. TAPPAN,
Att'y Gen'l, State of New Hampshire.
WHEELER H. PEEKHAM,
Compl'ts' Sol'rs.
J. A. CAMPBELL,
Deft's Sol'rs.

[ENDORSED.]

SUPREME COURT U. S., 1881, OCTOBER TERM.

No. 2, *Original.*

The State of New Hampshire, *Compl't*, vs. The State of Louisiana, *et al.*

Stipulation to assign cause for argument.

Filed 9th January, 1882.

Supreme Court of the U. S.

STATE OF LOUISIANA, *ex rel.*
JOHN ELLIOTT AND OTHERS,
Pl'ffs in Error.

AG'ST

No. 845.

ALLEN JUMEL, *Auditor,*
AND OTHERS,
Def'ts in Error.

The case is mandamus to compel State officers to pay out a fund in accordance with the Constitution and Laws of the State of Louisiana prior to the Constitutional Amendments of 1874.

The case cannot be reached in the ordinary call of the docket before the expiration of the terms of office of the defendants, the present State officers.

The case involves the validity of the Constitutional Amendments of 1874; and the duty of the State officers to levy and administer taxes under the laws and constitution prior to 1874.

WHEELER H. PEEKHAM,
for Pl'ff in Error.
J. A. CAMPBELL,
Def'ts Sol'r.

[ENDORSED.]
SUPREME COURT U. S., 1881, OCTOBER TERM.
No. 845.
The State of Louisiana, *ex rel* John Elliott, *et al.*, *Pl'ffs in Error*, vs. Allen Jumel, *Auditor, &c.*
Request to advance.
Filed 9th Jan'y, 1882.

Supreme Court of the U. S.

JOHN ELLIOTT, AND OTHERS, *Appellants.*

AG'ST

ALLEN JUMEL, *Auditor*, AND OTHERS IMPLD. WITH THE STATE OF LOUISIANA, *Appellees.*

No. 856.

Plaintiffs and defendants request and move the court to advance this cause on the docket, and to set the same for hearing on some day in March, 1882.

The case involves the validity of the Constitutional Amendments of the State of Louisiana, with reference to its public debt and the distribution of a fund now held by the defendants, officers of said State of Louisiana, whether for payment to the holders of said public debt, or to the ordinary purposes of the Government. Until decided, the State officers are unwilling to deal with the fund.

WHEELER H. PEEKHAM,
App'l't and Compl'ts Sol'r.

J. A. CAMPBELL,
Def'ts Sol'r.

[ENDORSED.]

SUPREME COURT U. S., 1881, OCTOBER TERM.

No. 856.

John Elliott, *et al.*, *Appellants*, vs. Louis A. Wiltz, *Governor, &c., et al.*

Request of Counsel to advance.

Filed 9th of Jan'y, 1882.

Supreme Court of the U. S.

THE STATE OF NEW HAMPSHIRE
AG'ST
THE STATE OF LOUISIANA, *et al.*
Original No. 2.

JOHN ELLIOTT, *et al.*, *Pl'ff in Error*,
vs.
ALLEN JUMEL, *et al.*, *Def't in Error.*
No. 845.

SAME, *App'l't*,
vs.
SAME; *Rep't.*
No. 856.

City and County and State of New York, ss.

Wheeler H. Peckham of said city, being duly sworn, says he is of counsel for plaintiff in the first above entitled suit and for plt'ff in error in the second, and for appellant in the third.

In the first, a stipulation that the same be set for hearing sometime in March, 1882, is on file.—In the two others, a motion in each, made by both parties to advance the cases on the docket, and set them for hearing at the same time with the first above entitled case.

The two Elliott cases were brought in Louisiana under deponents direction.

Act No. 3 of Laws of 1874 of the State of Louisiana provided for the issue of certain bonds, and the levy

and appropriation of a certain tax to pay the interest coupons thereof.

The records in all these cases show, that on January 1st 1880 there was in the hands of one of the defendants certain money raised and appropriated under said law, to pay the coupons of January 1st 1880.

In the year 1879, Louisiana adopted a new constitution part of which called the debt ordinance, scaled the bonded debt and "remitted" the coupon due January 1st 1880, and appropriated the money raised to pay the coupon of January 1st 1880 to the general purposes of the State Government.

In the original case the bill is filed to enjoin this threatened diversion of the fund from the payment of the coupons to general state purposes.

In No. 845 a mandamus proceeding was begun in the state courts to compel the state officers to apply the money to the payment of coupons.—It was removed from the State to the Fedral court and judgment in the Federal Court rendered against the relator and a writ of error taken to this Court In No. 856 a bill was filed in the Fedral Court to enjoin the threatened diversion of the fund, and on hearing, the bill dismissed, and complainant appeales to this Court.

All these cases, in deponents opinion, involve the same point and only the one point, namely, the effect of the constitutional amendment of 1879, and the constitutional amendment of 1879, on the contract of the state made in Act No. 3 of 1874, and the constitutional amendment ratifying the same and the bond issued thereunder, except that the original case involves also the question of the right of one State to sue in this court under the circumstances disclosed—the State under special statute

having taken an assignment of bonds from an individual,

In the two cases on the regular docket, No. 845 and 856, the defendants—being defendants in error and appellee unite with the plaintiffs in making the motion.

The motions filed state the month of March as the time for hearing desired; but that time has of course become impossible. The request for hearing in April is now made by both sides. Judge Campbell wrote me that he had to go last week to New Orleans, but that "if the cases can be fixed for between the 12th and 20th of April, I will be ready, if not sick."

The matters stated as to these cases appear in the record, and this affidavit is made merely as a brief statement for the convenience of the court on these motions. A printed copy of Act No. 3 and the new debt ordinance is also herewith submitted. The new constitutional debt ordinance is shown in the record.

WHEELER H. PEEKHAM.

Subscribed and sworn to before me this 28th day of March, 1882. GEO. W. CARR, [SEAL.]

Notary Public,
in and for the City and County of New York.

[ENDORSED.]

SUPREME COURT U. S., 1881, OCTOBER TERM.

No. 2, Original; Nos. 845 and 856.

The State of New Hampshire, *Compl't*, (*No. 2, orig'l.*) vs. The State of Louisiana, *et. al.*

The State of Louisiana *ex rel* John Elliot, *et al.*, *Pl'ff's in Error*, (No. 845,) vs. Allen Jumel, *et. al.*

John Elliott, *et al.* (No 856,) vs. L. A. Wiltz, *Gov., &c.*

Affidavit of Wheeler H. Peekham.

Filed 29th March, 1882.

108-16

FILED
MAR 15 1880
D. W. MIDDLETON, Clerk

United States Supreme Court.

THE STATE OF NEW HAMPSHIRE

against

THE STATE OF LOUISIANA AND OTHERS.

COMPLAINANT'S BRIEF

ON MOTION FOR PRELIMINARY INJUNCTION.

MASON W. TAPPAN,
Attorney-General of New Hampshire.

WHEELER H PECKHAM,
Of Counsel for Complainant.

Supreme Court of the United States.

THE STATE OF NEW HAMPSHIRE *vs.* THE STATE OF LOUISIANA *et al.*	Original.

Motion for an Injunction Pendente Lite.

This is an original bill filed in this Court to enjoin the diversion by the defendants of a fund pledged by the State of Louisiana from the purpose to which it was pledged.

A motion for an injunction *pendente lite* was by leave of Court duly filed and notice that such motion would be brought on for hearing on the 15th March, 1880, duly served on all the defendants.

Statement.

The facts, as they exist and as alleged in the bill, may be briefly stated as follows:

In 1874, the State of Louisiana had outstanding some twenty-five millions of its obligations. It claimed more or less of them to be void, as having been fraudulently issued and obtained. It thereupon passed Act No. 3 of Laws of 1874, and immediately thereafter adopted the amendments to its Constitution expressed in Act No. 4 of Laws of 1874. These acts are found, pages 39 to 43 of Laws of Louisiana of 1874.

The Act No. 3 provided for the issue of bonds, to be known as "consolidated bonds of the State of

Louisiana," to the amount of fifteen millions of dollars, payable to bearer in forty years from January 1st, 1874, and that such bonds should be exchanged for then outstanding valid bonds and warrants, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and warrants.

It provided a board of liquidation to carry out the act, gave them power to pass upon the validity of any claim presented for exchange, and provided for an appeal to the Courts in case the claimant was dissatisfied with their decision.

The seventh section of that act is in the following words: "Sec. 7. Be it further enacted, etc., that a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied, and shall be collected, for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose and no other."

"And that it shall be deemed a felony for the fiscal agent or any officer of the State or board of liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years, nor less than two, at the discretion of the court. If there shall, during any year, be a surplus arising from said tax, after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchases, to be made by the said board of liquidation, from the lowest offers, after due notice; *provided*, that the total tax for interest and all other State purposes, except the support of the public schools, shall never hereafter exceed twelve and a half mills on the dollar."

"The interest tax aforesaid shall be a continuing

annual tax until the said consolidated bonds shal be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the Auditor and Treasurer and the said board, respectively, to collect said tax annually, and pay said interest and redeem the said bonds until the same shall be fully discharged."

The eleventh section of said act is in these words: "Be it further enacted, etc., that each provision of this act shall be, and is hereby declared to be, a contract between the State of Louisiana and each and every holder of the bonds issued under this act."

The constitutional amendment is in these words: "The issue of consolidated bonds, authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in nowise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary.

"The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds as the principal and interest of the same shall fall due; and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury."

Third. Assuming, then, the invalidity of the provisions of the Constitution of 1879 as affecting the contract, the questions raised are precisely the same as if such Constitution had never been adopted, and the plaintiff had shown by other sufficient allegations that the defendants intended to divert the fund from the payment of coupons to other purposes.

Indeed, the only purpose for which the allegations as to the Constitution of 1879 are inserted in the bill, is to show the certainty that the apprehended diversion will take place unless enjoined.

Therefore the other questions in the case are best considered by treating the Constitution of 1879 as if it had never been passed.

Fourth. The law and constitutional amendment of 1874 imposed on defendants the "plain official duty, requiring no exercise of discretion," to collect the tax levied thereby, and to apply proceeds thereof to the payment of these coupons, and not to divert it to any other purpose.

Defendants threaten to violate such duty by the positive official act of diverting the tax collected to other official purposes.

The plaintiff sustaining injury thereby "may have an injunction to prevent it."

2 Otto, p. 541.

In a word, the question is whether *the duty*, a violation of which is threatened, is "a plain official duty, requiring no exercise of discretion," or whether it requires an exercise of discretion.

(*a*) First, let us see what is the duty. Section 7 of the act appropriates the proceeds of the tax to pay the interest and principal of these bonds, and *to no other purpose*, and makes its diversion a

felony, and makes it *the duty* of defendants *to pay said interest*, &c.

Surely, the ingenuity of man cannot discover what discretion is involvod in the performance of that duty.

Discretion means "the exercise of judgment or prudence."

Is there in this act anything left to the judgment or prudence of defendants in respect to the application or diversion of the proceeds of this tax?

Is it in any way left to defendants to say whether the fund shall be used to pay these bonds or for other purposes?

And if not, what possible question in respect thereto is by the act left to their discretion?

On the contrary the duty is clear, positive, official.

The learned justice of the United States District Court for the District of Louisiana, in deciding the case of Elliott vs. Nichols (unreported except in newspaper), put himself to the trouble of examining the various duties imposed by law upon the auditor and treasurer as officers of the State of Louisiana, and after citing a number of statutes in relation to their general duties—*e. g.*, that they are members of of the executive department; that they are chosen by the people and liable to impeachment; that the auditor must adjust and settle all claims against the State payable out of the treasury, except such claims as may be expressly required by law to be audited by some other person; that he may in his discretion examine under oath parties presenting claims, and other persons, as to the facts of the claims; that in cases of allowed claims the auditor must draw his warrant on the treasurer in a prescribed form; that at the request of any person interested and aggrieved by his decision, he must refer the claim presented to be audited by the next General Assembly, and

that upon giving a warrant in settlement of any interest coupon he must cancel the same—concludes that there can be no question but that the auditor and treasurer of the State are executive officers, charged with the exclusive fiscal administration of the State, and having their respective duties clearly defined by its Constitution and permanent (whatever that may mean) laws.

We will grant all that; concede that there are many laws imposing many duties on these officers as to which they have discretion! What relevancy have such laws and such duties to the question at bar?

When and where before was it ever claimed that a plain official duty, requiring no exercise of discretion, was made any the less so by showing that under *other* laws *other* duties, which *do* require the exercise of discretion, were imposed on the same officers.

When and where before was it ever claimed that judicial jurisdiction to enforce a plain duty or enjoin its violation, the duty requiring no exercise of discretion, is ousted by showing that the same officer has *other* official duties which do require the exercise of discretion?

On the argument of the Elliott case Court and counsel were challenged to point out any possible discretion vested by the Acts of 1874 in the defendants, in respect to the diversion of this fund from the payment of coupons. None was suggested by counsel, and the court exhausts itself in showing that by other laws discretionary duties as to other matters are imposed on these officers.

Nor is the learned Justice any more happy in his effort to show that the acts in respect to which defendants were sought to be controlled in that bill and injunction were included in the ordinary duties of their offices.

The chief object of that bill and of the present one is to enjoin the diversion of a fund pledged to the payment of bonds some of which the plaintiffs held.

That in itself is a legitimate object of chancery jurisdiction.

Any one interested in a fund or property held by another for his benefit may maintain a bill to enjoin its diversion.

2d Perry on Trusts, § 816, and cases cited.

Precisely within that familiar principle, this bill is filed to restrain the violation of the "plain official duty, requiring no exercise of discretion," imposed by the Act of 1874—to wit, that this fund should not be diverted.

Whether plaintiff is entitled, in the order now asked or in the final decree, to other and affirmative provisions, is of no moment in considering its right to enjoin this diversion by order and decree. This plain official duty *not* to divert is the creature of this statute and constitutional amendment alone. It is not included "in the ordinary duties of their offices." It is a special duty, created by a special act, as to a special fund and for the benefit of specific persons, and plaintiff may have an order and decree for that purpose, even though it were entitled to no other.

It has been heretofore suggested—it may again be suggested—that the State officers have not kept this fund, the product of this tax, distinct, but had mingled it in the treasury in a common fund deposited in bank to the credit of the State or its officers.

Were such the fact they would be pleading their own wrong.

The law sets apart and appropriates to the purpose of paying this interest the fund raised by this

tax. It forbids its application to any other purpose. Its diversion is made a felony. In judgment of law the fund *is* set apart, and no officer will be heard to allege otherwise.

If in fact it is not, it must be replaced.

Atty. Genl. vs. Wilson, 1 Craig & Phillips, 1.

It therefore follows that we have nothing to do with what may be the "ordinary duties" of the treasurer and auditor of the State, or with questions whether such ordinary duties are discretionary or ministerial.

Our sole concern is with their duties under this special law and constitutional amendment of 1874, and particularly with the question whether these officers have any discretion to divert the fund from the purpose to which, by the act, it is appropriated.

The learned Justice, in the case referred to, says that the courts cannot interfere with the discretionary duties devolved under the laws on the Treasurer and Auditor, "viz., that, on the part of the Auditor, of determining as to the genuineness of the interest coupons, and that, on the part of the Treasurer, of determining as to the situation of the treasury with reference to the payment of the money upon the same, and that, on the part of both of these officers, of construing the Constitution and the laws with reference to the payments of these demands out of the moneys of the State."

We may admit all this, without, in the least, affecting our right of action.

We do not propose to take from the Auditor any assumed right to pass on the genuineness of the certificates. To enjoin diversion of the fund—even to command payment of coupons—would have no such effect.

He would still have power to pass on the genuineness of the coupons presented, free from all control of the courts, provided only that in so passing he act in good faith.

Says the Chancellor in *Walker vs. Devereux* (4 Paige, p. 251), where the discretion is vested in certain persons "no Court is authorized to interfere with or control that discretion; *provided it is exercised in good faith.*"

We do not propose to take from the Treasurer the assumed discretion of determining as to the situation of the Treasury with reference to the payment of the money upon the coupons.

It may be that the Treasurer has a certain discretion in the administration of this fund for the purpose of paying the coupons. On the due date of a coupon, sufficient to pay all of that date may not be collected, though he may have enough to pay all on that day presented. Under such circumstances the Treasurer may have some discretion, and this bill does not propose to interfere with it; but the Treasurer has no discretion to divert the fund to *other* uses.

It is such a diversion, as to which there is no discretion, that we seek to enjoin.

And so as to the discretion of construing the laws.

This proposition by itself we wholly deny; but for the argument conceding its soundness, it surely must as in other cases be limited by good faith and to a case where there is some room for construction.

There is no room in the Act and constitutional amendment of 1874 for the construction that this fund can be diverted from payment of bonds to general State purposes. No such construction can be given in good faith. To do so would be *legislation*, not construction.

And surely it cannot be claimed that these officers

have any discretion to construe the Constitution of the United States and to decide what legislative act of the States fall within its prohibitions.

Thus conceding to these State officers every possible or claimed discretion, it still remains a fact that they have no discretion to divert this fund, and that it is precisely such diversion which this bill seeks to enjoin.

(*b*) It has been claimed, however, that the bondholders have not such an interest in this fund as is necessary to maintain this bill, and that even if they had there is a certain undefined sanctity pervading the fiscal matters of a State which forbids judicial interference.

It would seem as if recent decisions of this Court had effectually disposed of such questions. We find, however, that such decisions are very summarily disposed of by the learned District Judge in Louisiana in the case already referred to.

The learned Judge says, that in Osborn vs. Bank the injunction was to protect specie in the bank vaults; in Davis vs. Gray, to prevent a cloud on the title to plaintiff's land, and in McComb vs. Board to prevent the value of plaintiff's bonds from being affected by the unauthorized issue of similar bonds to others. To distinguish those cases the Judge says, "but in all these cases the thing that was sought to be *protected* was by law subject to the control of the Courts."

The learned Judge then adds, that though the principle of those cases applies to this, yet the Courts lack "authority to apply it" because of the exclusive power vested by the State of Louisiana in its Auditor and Treasurer over the fiscal administration of the State."

We submit that the effort of the learned Judge to "distinguish" the case before him from the cases cited is wholly unsuccessful.

The case of *McComb vs. Board* (2d Otto, 531, 541), was substantially identical with the one at bar.

There the property sought to be protected was bonds of the State of Louisiana, issued under this very act, of the same series as those held by plaintiff herein.

So far, then, as concerns the thing "sought to be protected," this and the case then before the learned Judge are *absolutely identical* with the McComb case.

The persons sought to be enjoined were also identical—*i. e.*, the persons who compose the board of liquidators under the act.

This case, therefore, definitely decides two points: 1st. That these consolidated bonds are property, by law, having a right to the protection and subject to the control of the Court. 2d. That the holders thereof have a right: "That the scheme" of the act and constitutional amendment of 1874 "should be carried into effect as a whole," and that any act inconsistent therewith should be enjoined.

2d Otto, p. 540.

The principle is most concisely stated on page 541: That "when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act any person who will sustain personal injury thereby for which adequate compensation cannot be had at law may have an injunction to prevent it."

It seems idle to argue or to cite authority in support of a principle thus stated by this Court to be settled substantially beyond discussion.

The principle is analogous to, if not identical with,

that of a trust where one person has received property for the benefit of another, which, says Mr. Story (2 Equity, § 1196), is the most simple form of an implied trust (§ 1231); "An agreement to *set apart* and pay certain moneys in a certain way raises a *lien or trust on those moneys* in favor of the person for whose benefit the agreement is made" (see also section 1255).

Martin vs. Funke, 75 N. Y. Rep., 134.
Curran vs. State of Arkansas, 15 How., 307.
Hoffman vs. City of Quincy, 4 Wallace, 535.

In *Curran vs. State* (15 Howard, p. 313), this Court said: "If a person deposit his property in the "hands of an agent, he may revoke the agency and "withdraw his property at his pleasure. But if he "should request third persons to accept the agent's "bills, informing them at the same time that he had "placed property in the hands of that agent to meet "the bills at their maturity, and upon the faith of "such assurance the agent's bills are accepted, the "principal cannot, by revoking the agency, acquire "the right to withdraw his property from the hands "of the agent—*it is no longer exclusively his.* They "who on the faith of his deposit have changed "their condition have acquired rights in it."

Whether the right to compel public officers to perform ministerial duties in which persons applying are interested be based on and identical with the doctrine of trust is of little importance. It compels the public officer to perform a duty or abstain from its violation, of which performance or abstention the party seeking relief is the beneficiary. When such duty consists in the administration of a fund it is hard to distinguish it from a trust, and when a question of discretion arises it is hard to see

why the rules which apply to trustees should not also apply to such officers.

It seems to be claimed, however, that there is something especially sacred in the financial affairs of a State, and that there is necessarily a larger discretion vested in financial than in other officers.

In that respect it is sought to distinguish this case from the cases of McComb vs. The Board, Davis vs. Gray, Osborn vs. Bank, and cases of that class, and to assimilate it to cases where *mandamus* has been refused against executive officers, such as—

Decatur vs. Paulding, 14 Peters.
Brashear vs. Mason, 6 How., 92.
U. S. vs. Guthrie, 17 How., 284, and similar cases.

It will be remarked that in all these cases it was sought to control the action of the executive officer with respect to the administration of the fund confided to his care *within* the boundaries to which he might apply it.

Take the case of *Decatur vs. Paulding* (14 Peters, 497), where, by the way, the Secretary of the Navy is by statute designated as the trustee of the Navy Pension Fund.

14 Peters, 514; 4 Stat. at Large, 572.

In that case the effort was to compel the Secretary of the Navy to pay a pension to the plaintiff. There was no question of the administration of the Pension Fund for any other than pension purposes. The whole matter was within the boundaries of the law and the duties of the Secretary of the Navy with respect thereto.

The Court held that the duties as to which action was invoked were discretionary, and not ministerial —three Judges dissenting.

The case of *Brashear vs. Mason* (6 How., 92), was

also an effort to make the Secretary of the Navy administer the Navy Fund in accord with what was claimed to be the law of the Fund. It was the case of a mere creditor asking for his pay.

The case of *U. S. vs. Guthrie* (17 How., 284) was similar in character to the last, being the demand of one claiming to be Judge for payment of his salary.

But suppose the Secretary of the Navy or of the Treasury had attempted to divert the whole fund intrusted to his care to some wholly foreign purpose, such as for instance the establishment of a National Gallery of Art, and had refused to apply it to the payment of any pension or *any* naval or judicial salary! Can it be supposed that an injunction would have been denied to a person legally interested because of anything that was held or even said in those cases?

If we grant in this case to the defendants every possible discretion that was claimed for the executive officers in those cases, it still remains that under no possible circumstances have the defendants the discretion or the right or power to do the thing which the complainant here seeks to enjoin.

The English cases cited are very similar in character.

That of the Queen vs. Commissioners (7 L. R., Q. B., 387), cited by the learned District Judge, was a case of a mere ordinary creditor applying for mandamus to compel payment of his claim.

That of The Bankers (14 Howell's State Trials, 1) was a case of charge upon a special fund, and the charge was sustained and the plaintiff obtained relief. The opinion of Lord Somers, cited by the learned judge below, dissents from the law of the case as finally settled in the House of Lords.

Hargrave's case of "The Bankers," and comments of Iredell, *J.*, in the Chisholm case, 2d Dallas.

In all the cases, both English and American, there was a certain fund at the disposal of the executive officers for distribution among a class, and in all, a person claiming to be of that class asked mandamus in his favor. The broadest possible principle that can be claimed to be established by them is that where a fund is given for the general purposes of the office, courts will not control its *administration* or *distribution within those purposes.*

This distinction is well illustrated in the case of *Murray vs. Earl Clarendon* (L. R., 9 Eq. Cases 20).

Complainant, as diplomat, claimed payment out of the foreign office fund for salary. Lord Romilly, M. R., said: "But the difficulty, or rather the im- "possibility, of treating it as a trust fund is this: "That it is paid for the general purposes of the office. "It is not paid in trust for any particular person. "The case that was cited was to this effect: That if "Parliament votes a sum of £1,000 for *John Smith*, "and the treasury devote in their books the pay- "ment of that sum to other purposes, then a man- "damus will lie to the treasury to order them to "pay that £1,000 to *John Smith*. But there is "nothing of the sort here. Parliament has merely "voted certain sums to Her Majesty, and of these "sums £600,000 are to be applied to the foreign of- "fice. The distribution of that amount is left to the "officers of the foreign office to apply, * * * * and "there is nothing whatever to connect the plaintiff "with a penny of this money in any respect."

Again, the distinction is quite as clearly expressed by Lord Cockburn in the very case cited by the learned District Judge, that of Queen vs. Lord Commissioners (L. R., 7 Q. B., 394), though in a different way.

"Therefore the question comes to be, whether the Lords Commissioners of the Treasury, when this

money gets into their hands are bound to apply it as *the servants of the Crown*, or as the *servants of parliament* who vote the money."

And the learned Chief Justice goes on to show that the Lords are to apply it as *servants of the Crown*, and therefore mandamus will not lie.

Had, however, the duty been cast on the Lords as the *servants of parliament* the decision would have been otherwise.

In the same case (p. 397) Judge Blackburn says: "The question remains whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by mandamus, namely, to issue a minute to pay that money; because it seems to me *clear that we ought to grant a mandamus if there is such a statutory obligation.*"

And in *Regina vs. Treasury Commissioners* (16 Q. B., 360, 361) Lord Campbell says: "The claim here being for the arrears of an annuity *granted under an act of Parliament*, and charged upon the consolidated fund, we think the application for a mandamus was regular."

Now, turning to the act and constitutional amendment of 1874 we find a wholly different condition of things.

We find here not only a "statutable obligation cast upon" these defendants to levy and collect this tax and pay the proceeds to bondholders, and not to divert it to any other use, not only a duty cast on these defendants as the "servants of the" Legislature ["Parliament"], not only a "vote by Parliament of £1,000 for John Smith"—*i. e.*, a vote of the proceeds of the tax to pay bondholders and *no others*—but we find that all this is done in the form and as part of a contract on the faith of which these bonds were issued and taken by the first holders and by complainant.

Can there be a clearer case of trust? Can there be a more positive and definite appropriation by the Legislature of a certain fund *to bondholders?* Can there be a more definite duty imposed by the *Legislature* on these defendants to set apart these funds and not to mix them with other funds and to apply them to the sole purpose of paying interest and principal of these bonds to the holders thereof?

In not one of the cases referred to in this Court or in England was the appropriation a part of the contract on which the services were rendered.

The appropriation was to government to pay for services or materials for which the government might have contracted to pay, but of which contract the appropriation formed no part.

Here the appropriation is part of the contract—made so by express terms. The tax is levied, the money appropriated, payments to be made, all for the specific designated purpose of paying these bonds, and yet these defendants have the audacity to say that a diversion of the funds to general State purposes is within their official discretion.

The case of *Twycross vs. Dreyfus* (5 Law Rep., Ch. Div., 506) has also been referred to.

In that case the money was not in the hands of the agent with statutory or other directions to pay it to plaintiff.

There was no law or even contract imposing on defendants the duty, or even giving them the power or privilege, of paying the complainants, and complainants had no lien on or interest in the fund. Complainants had a *mere bond.* True, *on the back of that bond* was indorsed the information that the Peruvian Government would appropriate all its revenues to the payment thereof, especially proceeds of sales of guano. No law, however, had made the appropriation or imposed on any officer the duty of paying over such proceeds.

Had the agent been sent the money, with instructions to pay the bonds, no doubt an action would lie against the agent.

Lariviere vs. Morgan, L. R., 7 Ch., 550, 7 Eng. and Irish Appeals, 423.
Lawrence vs. Fox, 20 N. York, 268.
Martin vs. Funk, 75 N. York, 134.

Let us now examine for a moment what acts of State executive officers this Court has restrained, and whether they involved in any degree less of discretion than in the case at bar.

In the McComb case (2d Otto), the State executive officers were enjoined from funding one kind of State security into these very bonds, because to do so would violate the provisions of the Act of 1874 and would depreciate the value of the complainant's bonds. Was not that a matter of finance in the largest sense? Can you touch the financial discretion of a State in any manner more positive and direct than when you control the securities it shall issue and the terms upon which they shall be issued?

In *Davis vs. Gray* (16 Wallace) this Court stopped the execution by the executive officers of the land laws of the State. The chief property of the State consisted in its public lands. It adopted a scheme with respect to them. It invested its executive officers with large discretionary powers to dispose of them. This Court, however, held that as to lands before granted this scheme conflicted with the Constitution of the United States, and that, consequently, as to such lands, the State officers had no discretion, and enjoined their action.

Is not land quite as sacred as money? Is not a State's administration of its land laws quite as sacred as its administration of its financial laws?

So in *Osborne vs. The Bank* (9 Wheaton), the action enjoined the execution by the State of its tax laws—the collection by State officers of the State's revenue. Here the very gist of all State financial administration was enjoined; the structure was stopped at its base.

We submit then that from all the cases referred to, two conclusions must follow:

(1) That plaintiff's bonds are property, entitled to be protected from injury by the violation of any plain official duty not requiring the exercise of discretion.

(2) That the financial officers of the State had and have no discretion to divert the fund raised under the Law of 1874 from the payment of the interest on the bonds to which it was appropriated.

Fifth. There can at this day be no dispute, either here or in England, that either mandamus or injunction will go from any competent Court against any executive officer, no matter how high his station, to enforce the performance or prevent the violation of any ministerial duty.

The difficulty has been in drawing the line between discretion and no discretion. In *Marbury vs. Madison* (1 Cranch, 137), it was held that mandamus would go to compel the Secretary of State to deliver a commission, but that this Court had no original jurisdiction in the premises.

In *Kendall agst United States* (12 Peters, 608), mandamus was awarded—Chief Justice Taney and Judges Barbour and Catron dissenting, on the ground that jurisdiction to issue mandamus had not been vested in the Circuit Court for the District of Columbia, and *not* on the ground that the act commanded was not ministerial in character and properly the subject of the writ.

In *Decatur vs. Paulding* (14 Peters), the writ was claimed on the ground that the act desired was discretionary and not ministerial in character—Judges McLean, Story and Baldwin dissenting, and holding the act ministerial in character, and Judge Baldwin holding on the merits against the relator.

In *Brashear vs. Mason* (6 Howard), the writ was denied on the ground that the act was discretionary in character.

In *United States vs. Guthrie* (17 Howard), it was denied. The opinion of four Judges, Taney, *Ch. J.*, Daniel, Wayne and Catron, held, the act claimed, to be discretionary in character, and on that ground affirmed. The opinion of Curtis, *J.*, with whom concurred Nelson, Grier and Campbell, *JJJ.*, held that the real question involved was the right of the relator to the office, and that mandamus was not the proper remedy; and on that *ground only* affirmed.

McLean, *J.*, dissented, and in an elaborate opinion held that the writ should go.

Thus, only a minority of the Court held that the secretary was not liable to mandamus on account of the discretionary character of his duty.

In *State of Mississippi vs. Johnson* (4 Wallace, 475); *U. S. vs. Comp. of Land Office* (5 Wallace, 563), and *Gaines vs. Thompson* (7 Wallace, 347); *Secretary vs. McGarrahan* (9 Wallace, 298), and *Litchfield vs. The Register* (9 Wallace, 576), the same general doctrine was restated.

> See also, Commonwealth of Kentucky vs. Dennison, Governor, &c., 24 Howard, 95, and Opinion of Taney, *Ch. J.*, as to the ministerial character of the act, p. 106.

A good definition of a ministerial duty is given by the Chief Justice in State vs. Johnson and cited in Gaines vs. Thompson, page 353: "A ministerial

duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty arising under circumstances admitted or proved to exist and imposed by law."

Other courts furnish apt illustrations of the kind of duty which is regarded as ministerial, and which will be enforced by mandamus and injunction.

Graham, State Treas., vs. Horton (6 Kansas, 343) was a case closely analogous to the one at bar.

The Legislature authorized the issue of bonds and the levy of a tax, and proceeds to be used as a sinking fund.

Article Eleven of the Constitution provided: "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object only shall the tax be applied."

Subsequently the Legislature, by joint resolution, directed that the sinking fund which had been raised should be invested in warrants issued to pay legislative and judicial salaries.

A holder of a five-hundred-dollar bond filed a bill to enjoin such diversion of the sinking fund, and the injunction was awarded.

The case was most fully argued by the counsel for the State Treasurer.

In *Galloway vs. Jenkins, Treas., et. al.* (63 N. C., 147), the State Treasurer was enjoined from issuing State bonds authorized by an unconstitutional law on a bill filed by a taxpayer.

In *People vs. Allen* (1 Lansing 248–258), the Comptroller of the State of New York (a constitutional and elective officer) was compelled by mandamus to pay moneys appropriated by law. This case was reversed in the Court of Appeals, but on the ground that the law requiring the payment was unconstitutional (42 N. York, 378).

Indeed, that court, in *People vs Allen* (42 N. York, 409) clearly expressed the opinion that mandamus against the Comptroller would lie to compel the loan of public moneys, pursuant to a law, provided the law was constitutional.

In *State vs. Chase, Governor* (5 Ohio, State Rep., 529), where the mandamus was issued, Chief Justice Bartley said:

"Under our system of government no officer is "placed above the restraining authority of the law, "which is truly said to be universal in its behests, "all paying it homage, the least as feeling its care, "and the greatest as not being exempt from its "power." In that case the court required the Governor to issue his proclamation, pursuant to a law requiring him so to do, in a certain contingency, which was admitted to exist.

Several of the foregoing cited cases, especially those in this court, refer to a certain power of construing laws vested in the public officer as a part of the discretion which the courts will not control.

In every case in which such reference or suggestion is made it appears that large powers of construction were given to the officers. The land office laws are a pertinent illustration where substantially judicial functions are given to the officers.

But, however large the powers given to the officers, no case can be found holding that on a matter in which the law leaves him *no discretion*, writs of mandamus and injunction will not go against him; nor can any case, save and except that decided by the learned District Judge of Louisiana, be found holding that the writ will not go in a matter as to which he has no discretion, because there are other matters whereof he has discretion as to which it will not go.

It is also beyond question the law of this Court,

that the power of construction of an executive State officer does not extend to the right to judge whether a subsequent State law changing his ministerial duty is repugnant to the Constitution of the United States.

Clearly no State law could vest in its officers any such discretion or any such jurisdiction called by any name.

The cases of *Osborn vs. The Bank*, *Davis vs. Gray*, and *Board vs. McComb*, seem decisive on that point.

The discretion claimed to be a defense must be in the execution of the law—a discretion under and pursuant to the law—not a discretion to disregard and overrule the law.

In the case at bar we submit that no words could more clearly and positively prohibit the diversion of this fund. No pretense is made that under the law there is anything left to discretion. The claim goes to the extreme length that in spite of the clear positive terms of the law, the officer has a discretion to disregard it.

Such a claim belongs to a government of satraps —it has no place in one of laws.

Sixth. It may well be that the State officers, as such, are not the persons charged with the execution of this law.

The law constitutes them a board of liquidators (sec. 2), a quasi corporation. They have certain duties as such board.

The levy and appropriation of the tax are made by the law (sec. 7).

The purchase and retirement of bonds out of surplus income are to be made by *the board* and it is made "the duty of the Auditor and Treasurer, *and* of "*the said board*, respectively, to collect said tax an- "nually and pay said interest and redeem the said

"bonds until the same shall be fully discharged" (sec. 7.)

This law substantially makes *the board* a trustee between the State and its creditors to collect and apply this tax. The sovereign acts of levy and appropriation are done by the law. Powers to carry it out are then vested in this board.

The Board stands in the same position as a municipal corporation, which, by virtue of law, has issued bonds with power to levy and collect a tax for their payment.

There is only this difference, that in the case at bar the levy is made in the act itself.

This brings the case within the principle of a familiar class of cases, where laws are made for certain purposes and certain commissioners or corporations then named to carry them into effect.

Attorney-General vs. Brown, 1 Swanston's Ch. R., 265.
Attorney-General vs. Dublin, 1 Bligh's N. R., 312.
Attorney-General vs. Belfast, 4 Irish Ch., 142–143.
Attorney-General vs. Eastlake, 11 Hare. 205.

Under these acts the individuals or the corporations were appointed "commissioners" or "trustees" to carry the acts into effect.

Eng. Stat. at Large, 13 Geo. 3d., Ch. 34; 1st Chitty's Stat., 625; 4 do., 754.

In these and many similar cases, diversion of the funds was enjoined and restitution decreed at the suit of the Attorney-General, and our own decisions show that a bondholder, secured by the tax, has the same right.

Now, that the persons who are named in the Act to carry out its provisions are also some of them

executive officers of the State, is surely irrelevant.

The duty is imposed as trustees under this act.

The State steps down from her high pedestal of sovereignty and makes this *contract*, and in and by this contract appoints this board as trustees to carry out its provisions.

We submit that the State is bound, the officers are bound and the bondholders, who have accepted the bonds on the faith thereof, have a right to invoke the aid of any court of equity to enjoin the trustees from a diversion of the fund.

Seventh. None of the reasons which have been given for refusing injunction or mandamus apply to this case.

The serious consequences to the State treasury of being governed by the decisions of several and possibly conflicting courts suggested in U. S. vs. Guthrie, or of "throwing the pension" or other "fund, and the whole subject of pensions" or of bonds, "into confusion and disorder" suggested in Decatur vs. Paulding cannot occur.

All that is here asked is that the officers obey the positive statute law and keep the pension fund for pensioners, the salary fund for salaries, and the *bond fund for bonds*, because the law has said in the most positive terms that the bond fund shall not be diverted.

Within the terms of the law that the fund shall be applied to bonds, and to bonds only, we do not propose to interfere with the judgment or discretion confided to the officers, always providing that they are exercised in good faith.

On the other hand, the consequences of a refusal to interfere in a case like this would be disastrous in the extreme.

Uncontrolled and absolute power would be intrusted to executive officers.

Control of the Legislature over the treasury would be practically gone.

The advantages of personal watchfulness over public interests by those having special interests would be lost.

Faith and confidence in the power and universality of the law would be weakened and the public faith itself become a shuffle ball to be kicked about by every cabal of executive officers.

To enjoin this contemplatod act would leave every possible benefit of discretion and prevent only the most palpable abuse of arbitrary power.

Eighth. A preliminary injunction should go because the injury threatened will, if carried out, be irreparable.

The act appropriates each year's revenue to each year's interest.

If this fund is diverted, the act provides no means whereby this year's interest can be paid. For that reason the Constitution of *1879* "*remits*" this interest—*i. e., confiscates* it.

Therefore, the Court will see that the fund is preserved *pendente lite* to answer whatever decree may be made.

High on Injunctions, §§ 899, 900, 901, 902, and cases cited.

To be sure a preliminary injunction is in the discretion of the Court—but as this Court said in *Osborne vs. The Bank*, "it is a *mere legal discretion*—a discretion to be exercised in discerning the course prescribed by the law; and where that is discerned, it is the duty of the Court to follow it" (9 Wheaton, p. 773).

Ninth. There can be no well-founded objection to the maintaining of this suit by the complainant.

The allegation in the bill is that the complainant is the "owner, holder and bearer of six of said bonds," of the denomination of one thousand dollars each. The bonds in form are negotiable, being *payable to bearer*, so that any purchaser obtains a perfect, legal title, the same as to any commercial paper.

State of Illinois vs. Delafield, 2 Hill, (N. Y.) 159–177.
Bank vs. Village of Rome, 19 New York, 20.
Mercer Co. vs. Hackett, 1 Wallace, 83.

And this is so, even if overdue and dishonored when purchased.

National Bank vs. Texas, 20 Wallace, 72.

Being a bearer alone then gives a complete legal title. What trusts or other relations may exist between the "*bearer*" and other persons is immaterial to the defendants.

The payee of a bond payable to bearer is as it were impersonal; the debt is owed in a sense to the bond itself; defendant is justified in paying the bond to any one who is the bearer thereof—even to a thief, if not informed that he is a mere thief; and a thief can give a good title.

Edwards on Bills, pp. 130–132.

Hence, on these bonds no question of assignment or of beneficial ownership can arise. There is nothing but the question of who is the *bearer*, and possession is conclusive evidence.

Tenth. This Court has jurisdiction.

(*a*) It is a controversy between two States.

(*b*) It is a controversy between a State and citizens of another State.

Const., Art. 3d, Sec. 2d, Sub. 1 and 2.

It may be urged that to maintain this jurisdiction might assert indirectly a jurisdiction which the Eleventh Amendment has taken away. That citizens of one State who could not themselves sue another State would assign their claims to their own State government which would itself bring the suit.

It is difficult to see how that question can be raised on this motion. As a defense it would be raised by plea, or under the rule, by answer in the nature of a plea. It is not responsive to the equity of the bill. It is a plea to the jurisdiction, and is no answer to a motion for a temporary injunction. It is a plea which the defendant would have to prove, for, *prima facie*, the bearer of a bond to bearer has, as we have seen, the complete legal title.

But the plea, if proved, would be no defense. This Court would still have jurisdiction.

The question has recently been discussed in a most able and exhaustive manner by Hon. Bradley T. Johnson, of Virginia, in the "American Law Review" for July, 1878.

It was also discussed during the last preceding era of repudiation in our country in the "North American Review" for January, 1844, by the late Mr. Justice B. R. Curtis, of this Court.

The article of Mr. Curtis is also published in his life by his son, B. R. Curtis, of Boston (vol. 2, p. 93, *et seq.*). Much the larger portion of this article is devoted to the consideration of the financial condition of the several States. The question of remedy occupies but a few pages at the end. The argument is so terse and cogent that we transcribe it entire:

"The views which we have thus far presented respect our domestic condition and policy; but the subject has a direct connection with the foreign relations of the United States.

It has always been admitted to be one of the duties, and consequently one of the rights of the sovereign power in every nation, to see that gross injustice be not done to its subjects or citizens in a foreign country.

If the injustice be of such a nature as to admit of legal remedy, and the courts of the land where it is done are open for redress, the sovereign is bound to wait till that redress has been sought for and refused in the highest court known to the law of that country.

It is presumed that justice will be done according to the course of the law of the land; and this presumption can be removed only by an actual failure to obtain it in the highest court.

No nation can answer for the equity of proceedings in all its inferior courts.

It suffices to provide a supreme judicature, by which error and partiality may be corrected.

This presumption holds even when redress has been refused, unless the decision is palpably wrong —*in re minime dubia.*

But where the decision against the foreign claimant is evidently unjust, or when the law studiously withholds its aid, so that he cannot obtain the fruits of a decision in his favor, or when the courts of the country are not open to his suit, the foreign sovereign is bound to listen to the complaints of his subject thus injured, and either make indemnification or seek it from the people by whom the wrong has been done.

It is apparent, therefore, that at no distant day this matter may become the occasion of negotiation with those governments whose subjects are interested in these debts.

In such an event the preliminary question would be, whether any courts of their country are open to foreigners seeking to recover their money of the State.

As a general rule, the courts of the States cannot entertain a suit against the States.

There are only three exceptions known to us, and those are the States of Mississippi, which allows the holders of her bonds to bring suit against the State in her own Court of Chancery, and the States of Maryland and Virginia, which, in some instances, have allowed suits against themselves, but always, we believe, by special laws.

How far the case of Mississippi would come within the rule of international law, which binds the claimant to seek for redress in the courts of the land where the wrong was done, we are not prepared to say.

So far as we know it would be a new case.

The Chancellor of Mississippi is elected by the people every six months.

He is, therefore, appointed by, and directly dependent on one of the parties to the suit; and the case has been prejudged by the Legislature.

Now, if the rule should apply at all, and the parties should be held bound to seek for justice at the hands of a judge thus situated, it seems clear that the decision would be much more open to doubt than in ordinary cases where the foreigner sues a citizen.

If the presumption that justice will be done according to the law of the land should exist, it would certainly be weak and easily removed, and would be quite as likely to lead to disputes and contentions as to settle them.

It is manifestly of great importance to us to have the full benefit of the presumption, which, for the sake of peace, the law of nations raises in such cases.

Without this presumption the claim for redress must be made on the Government of the United

States, and the cases judged of and decided by the parties to the negotiation; after which, if the foreign government is not satisfied with the result, it has just cause for reprisals and even for war.

With it the matter is first submitted to the highest legal tribunal; and the foreign government is bound to be satisfied with its decision, unless so palpably wrong as to give rise to the belief that it was corruptly made.

We have said that the claim for redress must be made upon the United States; for we cannot entertain the least doubt that the National Government is as much responsible for injustice done to foreigners by the States as by individuals or corporations.

Foreign States can know only that sovereign which has the power to make war and peace, to negotiate and enter into treaties,

They can no more have relations with a State than with a county.

If the wrong is done within the territory of the United States, the United States must answer for it.

But we believe our Constitution has not left us without the protection which is enjoyed by all other nations who have courts of justice open to foreigners seeking redress, and where they are bound to presume that justice will be done.

The Constitution as originally adopted contained. in Art. III, sect. 2, the following words:

"The judicial power shall extend to controversies between a State, or the citizens thereof, and foreign States, citizens or subjects."

The eleventh article of the amendments declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Thus the original provision as to suits against one of the United States by foreign States was allowed to stand.

Mr. Chief-Justice Marshall, in his very able opinion in the case of Chisholm vs. The State of Georgia, has stated the reason of this provision in such a manner as renders it quite applicable to our present purpose.

He says the Constitution contained this provision, "because as every nation is responsible for its citizens towards other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by and depend on national authority."

There can be no doubt, therefore, that by the terms of the Constitution a foreign State or sovereign may sue one of the United States in some court of the United States. Nor has the Constitution left it doubtful, or even left it for Congress to provide, which court it shall be, for it contains the following words:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

We conceive, also, that a foreign state or sovereign may easily be placed in such a condition as to prosecute these claims. It is incident to the sovereign power that it should be able to make itself the owner of such claims.

The rules as to the purchase and sale of rights of action which affect individuals are not applicable to the sovereign. The law presumes that the government of a country will not be guilty of champerty or maintenance. Under the common law the king might take an assignment of a debt, and sue therefor in his own name. And we have no doubt that

the same law exists in all countries. It seems to follow, then, that if the sovereign should take an assignment of a claim and sue therefor in the court of a foreign country, the comity and respect due to the foreign sovereign would necessarily prevent the Court from inquiring into the causes and motives of the assignment, especially in a country where the common law exists which makes all debts negotiable between the sovereign and a subject or citizen.

And if this motive were inquired into, it would appear that the foreign sovereign had taken the assignment merely to discharge a duty to his subjects by affording to them a remedy for a supposed wrong.*

Certainly it would not be a subject of complaint or regret on our part that this course should be taken, and that the foreign sovereign should submit the question to the decision of our own highest tribunal instead of resorting directly to negotiation.

In the event of such a thing becoming necessary, we should look upon an application to the Supreme Court of the United States as not only practicable but desirable, and we should feel thankful for the existence of that principle in the public law, and that wise provision in our own Constitution, which enables us to ask foreigners to seek for justice in that high tribunal which is created to establish it—a tribunal known to the world as elevated far above all States' biases and prejudices; whose members come together from the North and the South, from the

* It has sometimes been suggested, in answer to the view taken by us, that the Judiciary Act has so limited the jurisdiction of the courts of the United States that an indorsee or assignee of a chose in action cannot sue in these courts, unless the assignor or indorser could himself sue therein; but that limitation has reference only to suits in the Circuit and District Courts. It does not touch the original jurisdiction of the Supreme Court, which is conferred by the Constitution and is not within the control of Congress.

East and the West, across distances wider than half of Europe, and listen to sovereign States, as they contest their claims to territory and jurisdiction ; a tribunal which sits in judgment on the acts of the Legislature of the nation, and decrees them to be valid or void; a tribunal which is our own ark of safety, and to which offended Europe may come confidently and obtain such justice as war and reprisals never gave and never can give.

We have now presented our views of this important subject.

We fear that intelligent men throughout the country have hitherto scarcely done their duty in regard to it.

They have looked upon it as interesting only those States which are embarrassed by debts, and those which have taken false steps to escape from them.

They have thought it a matter of national concern only because it affects our character as a people.

But they must no longer forget that the rights of every honest man are violated by an unjust act of the government under which he lives.

It has been thought to be one of the advantages of a free government that the individual is not merged in the State; that each citizen is regarded and cared for, not merely because important to the State, but for the sake of his own welfare and happiness.

For him, as a man, laws are enacted; for him rights exist; for him remedies are provided.

He stands before all tribunals capable of claiming whatever is just.

He means not to identify himself with any class, or community, or corporation.

As a citizen, he has all the rights which can be had; and, among those rights, he has eminently that of requiring the government of which he is a

constituent part, to do nothing which shall stain his honor, or shock his sense of justice, or lessen his patriotism, or deprive him of his share of the glory of his country, and if any public act does this, he has as much right to feel aggrieved as if his personal liberty were infringed.

It is true he walks abroad unharmed in his person, but a violent constraint has been put upon his love of justice.

It is true his house and land are untouched; but his country's glory, for which he wonld at any time have sacrificed them, has been squandered and lost.

He still has a country, but that which made it lovely in his eyes has been defaced and destroyed.

Let every honest man, then, take care to do what in him lies to protect himself from this great wrong, and never rest until the faith of his country has been redeemed, and its honor secured from reproach."

From a letter of Mr. Justice Story, found on p. 102, Vol. I, of the Life of Mr. Curtis, it seems that the views expressed in the article met with the warm approval of that eminent jurist.

One of the difficulties suggested by Judge Curtis is in a State's obtaining a legal title to a *chose in action*. The accomplished writer overcomes it by reference to the common law doctrine of England and continental Europe, that all claims are assignable to the king. In the case at bar, the bonds being negotiable, that difficulty does not exist.

The article of Mr. Johnson is too long for transcription. The points of his argument may be thus briefly stated :

(1) By common and international law, no citizen of one sovereignty or State can sue in the Courts of his own country any other State or sovereignty, nor could he sue such other State in its own Courts.

(2) By the same common and international law sovereigns may assert, maintain and collect the claims of their citizens against other sovereigns or States.

These propositions he shows to be undisputed, either in diplomacy or law, citing Smith vs. Weguelin (8 L. R. Eq., 198); Nathan vs. Virginia (Notes to 1 Dallas, 71); The Exchange (7 Cranch, 116), and many other cases as to the first point; and Vattel Lit. 2 (Chap. 6, Sec. 71); 2d Phill. Inter. Law, 8, and the resolutions and circular of the English Government with reference to British subjects holders of unpaid foreign bonds in 1848, on the second point.

We may add the reference to the action of our own government on the familiar cases of the Alabama claims and the Fisheries award.

(3) That by Article 9 of the Articles of Confederation the Congress was made a tribunal of last resort to settle "all disputes and differences * * * between two or more States concerning boundary, jurisdiction, *or any other cause whatever*," and a procedure prescribed.

(4) This power in Congress was found ineffectual for the same reason that the Confederation was found ineffectual as to all other powers. Congress could decide, but it could not enforce; adjudge, but not execute.

(5) The principal purpose and feature of the Constitution was to supply this deficiency, and it would seem clear that in extending the judicial power of the United States to controversies between States, the States meant to grant their whole power to the United States.

"The States had the right to decide upon controversies between themselves, and the right to enforce their determination by war. This power and right, 'unimpaired by any act and controlled by no authority,' they delegated to the Union."

(6) For that purpose the grant of judicial power to the United States in the Constitution was made. It included the right of a citizen of one State to sue another State in assumpsit (citing Chisholm vs. Georgia, 2 Dallas, 457).

(7) The doctrine of Chisholm vs. Georgia, that a State is not sovereign as to her contracts, that she may be sued on such contracts remains undisputed to the present day (citing many cases).

(8) The 11th amendment was the act of the States, and by it they resumed their responsibility under the laws of nations, to protect the rights of their citizens; "and thenceforward it became their "duty to use the power retained by them and the "remedies given to them under the Constitution, "to enforce the rights of their own citizens" (p. 652).

(9) The limitation of the Constitution was that those rights, instead of being enforced by diplomacy and war (the ordinary and only means of sovereigns), must be enforced through the judicial power of the United States, or by negotiation, with the consent of Congress.

(10) That, independently of Congress, this Court, in matters of original jurisdiction, has power to regulate its procedure and to enforce its decrees.

It is impossible to do justice to the force and cogency of the argument of Mr. Johnson by any abridgment thereof or statement of its points. We therefore beg of the Court its attentive consideration of the argument itself.

The case of Chisholm vs. Georgia definitely decided the construction of the grant to the United States of judicial power in "controversies between two or more States," and "between a State and citizens of another State."

The construction was, that "the *controversy*

arising, it matters not what the subject matter may be, the Court will entertain and enforce jurisdiction."

Johnson's Article, p. 651, and csses cited.

In the Chisholm case the strongest effort was made to limit the plain, natural meaning of the words that made the jurisdiction depend upon parties by the technical law existing in the States prior to the adoption of the Constitution.

The various constructions that had been given to the clause in the Constitution were all cited and commented on by Court and counsel, and the construction given in accord with the plain, natural meaning of the words.

Mr. Justice Iredell, in his dissenting opinion, strongly argues that the controversies between a State and citizens of another State, to which the judicial power extends, should be limited by reference to antecedent laws for the construction of the words used; and that inasmuch as no antecedent laws gave a right of action against a State, none should exist under the Constitution.

The Court, however, declined the construction according to antecedent laws.

All the Judges, except Mr. Justice Iredell dissenting, take the broader view and adopt the more liberal construction, that the Constitution of the United States was intended as, and actually was an improvement on and in advance of other forms of government theretofore adopted. One of its great objects was to eliminate from the people forming the Union the ordinary results of animosities and controversies between States, and between the citizens of different States. For such animosities and controversies diplomacy and war had theretofore been the very unsatisfactory remedies. To effect this

result a common arbiter and tribunal were necessary. It was provided for in the judicial power of the United States.

The language of Ch. J. Jay (p. 478) in that regard, is admirable to the last degree: "I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not now the case, ought not to be thus collaterally and incidentally decided; I leave it a question."

In the subsequent case of *Rhode Island vs. Massachusetts* (12 Peters, 657), this Court held that it had jurisdiction of a disputed question of boundary and to the objection that such a question was political in character, answered that though in other countries and as a question between other political corporations it undoubtedly was a political question, *i. e.* to be decided by the ordinary means of diplomacy or war yet that the Constitution had with us made it a judicial question by providing for its solution by the courts (see p. 736 *et seq*).

And the doctrine was affirmed in the recent case of Virginia vs. West Virginia, 11 Wallace, 39.

Therefore assuming that the assertion by one State of claims of its citizens against another State would raise a political question, such assumption would be no objection to the jurisdiction of this Court.

Indeed, it is household words that the jurisdiction of courts, both of the States and United States, extends to questions of which the courts of no other country have cognizance, and most, perhaps all, of which are what would elsewhere be regarded as political in character.

Let us for a moment look at the consequences if this court has no jurisdiction.

It is clear that no distinction can be made between the suit of one of the States and of a foreign State. The Constitution speaks of both *uno flatú*.

If a foreign State, asserting rights of its citizens, is denied access to the courts, and is also denied negotiation with the State, and feels aggrieved, it may unquestionably, under the law of nations, resort to the United States. In a case like this the United States could not but acknowledge the justice of the claim.

Unless through the judicial power the United States would have no means of collecting the sum from the defaulting State. It cannot tax, for taxes must be uniform. It must, then, either itself satisfy the foreign State, or accept the alternative of war.

The foreign State, however, would have its remedy; it could protect and enforce the claims of its citizens—if not through the courts under the Constitution—then by the old means of diplomacy and war.

If the parties injured, however, happen to be citizens of one of our States, they would have no redress. The 11th amendment shut them out from maintaining their own suits; and if their States are also prohibited from asserting their claims for them in the only way in which, within the Union, claims can be asserted by the "peaceful methods of judicial proceedings" they are without remedy.

By joining and making the "Union," instead of "establishing justice," they have given up the remedy they before had, and have obtained nothing in its place.

They are worse off than the foreigner, who still has the old remedy. They have neither the new nor the old.

Tenth. The holding of these bonds by the complainant, whether in her own right or in trust for her citizens, is not a violation of the clause of the Constitution which forbids a State to "enter into any agreement or compact with another State."

The compacts or agreements intended are those of a political nature, such as could be made between sovereigns only. It does not forbid ordinary business agreements such as could be transacted between individuals, least of all was it intended to forbid the purchase and ownership by one State in the open market of the securities of another.

Union Branch R. R. Co. vs. East Tenn. & Geo. R. R., 14 Georgia Rep., 327.
2d Story Com., §§ 1354–5, 1401–2–3.

A promise to pay money is not an agreement of the character intended to be prohibited.

In the beginning of its existence, this Court, by Mr. Justice Wilson, said: "A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it. The latter is amenable to a court of justice upon general principles of right. Shall the former when summoned to answer the fair demands of its creditors, be permitted, Proteus-like, to assume a new appearance and to insult him and justice, by declaring, *I am a sovereign State*? Surely not.

4 Dallas, p. 456.

In these present years it speaks the same language. "The truth is, States and cities when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons."

96 U. S. Rep., 445.

Mr. Chief-Justice Taney, in *Holmes vs. Jennison* (14 Peters, 572), following Vattel, gives to the words "compact and agreement" a meaning differing in degree, but not in kind, from the word treaty; and Mr. Justice Story says, in arriving at the same result, that the maxim "*noscitur à sociis*," applies.

2d Story on Const., §§ 1402-3.

It would seem clear that to the case of negotiable bonds issued by a State to individuals, this constitutional clause has no application.

The compact or agreement made in these bonds, so far as the State is concerned, is made with the individuals who take the bonds. One of the features of that contract, given to it by the commercial law, is that it is assignable, and that the assignee takes not only an equitable, but a legal title, and can sue in his own name.

The two States make no contract—an individual assigns to one State a contract he has made with another.

To say that a State could not thus become the assignee of a contract would be going much further than in the illustration put in 14 Georgia, that a State could surely sell to another State a locomotive or other personal property having no political characteristics without consulting Congress. Suppose a State a creditor of one of its own citizens, who had bonds of another State and nothing else, and the bonds unsalable because of threatened repudiation; can there be any doubt of the right of the State to take the bonds in payment or on account of the claim? Surely not!

Aside, however, from this aspect of the question is the political right of the State to assert claims of its citizens flowing from the law of nations, and the effect of the 11th amendment in taking from the individual the right to himself assert it.

Title, in the strict legal sense, is not in such cases regarded. It is a right asserted in behalf of citizens, and, as we have seen, cannot be supposed to have been taken away without the provision of some substitute. As the Constitution was originally adopted a substitute was given in the right of the individual to sue. When that was taken away the right of the State to represent him must have revived.

Eleventh. Even if the complainant would not be entitled to a judgment *quod recuperet* against the defendant State, it may have judgment prayed for in this case to enjoin the diversion of this fund. Complainant has never entered into any agreement with the defendant. It has become the assignee of these bonds, for payment of which the individual defendants hold a fund, and which fund defendants propose to divert. This fund is the primary fund for the payment of the bonds, and complainant may well have a right of action to stay its waste; like the right of action of a bondholder against an assignee of the equity of redemption who has taken subject to, but not assuming the mortgage.

Twelfth. None of the difficulties as to execution of any decree, passed herein, that were apprehended in the early cases—*e. g.*, Chisholm vs. Georgia —can here occur.

The writ and decree will go against the *individual defendants.*

The State is made defendant, not so much to obtain a definite judgment against the State as to obviate any objection that might be made that the principal is not before the Court in a case where the Court has jurisdiction of the principal.

Such objections were made in the cases in 9 Wheaton, 16 Wallace, and this Court answered them by saying that the action would be against

the State officers without the presence of the principal in cases where the Court had no jurisdiction to bring in the principal.

Thirteenth. We most respectfully submit to the Court that apprehensions of a mass of business of this character in this Court are without foundation and not entitled to consideration.

As is shown by Mr. Justice Curtis, the cases where a State will feel bound to take up and assert the claims of its citizens are rare.

It will be only in cases of general and glaring injustice, like the present whirlwind of repudiation, that such remedies will be thought of, and it is precisely in such cases that they are needed.

Men see that at such times some tribunal other than a legislative body elected exclusively by the debtors must be appealed to if justice is to be done.

Nor is there in such an appeal anything inconsistent with the sovereignty and highest dignity of the State.

To suppose the contrary is a relic of barbarism—of times when divine grace and justice were supposed to lodge in the person of the king.

Nothing can be more inconsistent with the true dignity of the State than to refuse or even omit to do right.

All admit that the State is bound to entertain and fairly adjudge claims against itself.

No one supposes that the dignity of the State is lessened when such claims are entertained and passed upon by the Legislature. No one ought to suppose that its dignity is lessened by apportioning such jurisdiction to the Courts properly organized to administer it, rather than to the Legislature, which, by its organization, is wholly unfitted to discharge the duties.

For many years the propriety of the transfer of jurisdiction of claims against the public from the Legislature to the Courts has been to a degree admitted and acted on.

In England the petition of right with an origin wrapped in mystery has grown in precision and availibility, till, by the Act of 1860, it has become a proceeding almost as familiar as an action of assumpsit.

The Secretary of State for war, it was supposed, could always be sued in a common action.

The Court of Exchequer Chamber had jurisdiction of suits by private persons to adjudge charges on the revenue.

See history of the petition of right in Chisholm vs. Georgia, p. 440; including the citation from the Bankers' Case.
And see Hargrave's Case of the Bankers, and 14 State Trials, 1.
See Eng. Statutes, 23 and 24 Victoria, Ch. 34.
And Kirk vs. The Queen, L. R. 14 Eq., 563 and 565.

In our own country, Georgia, Mississippi, Arkansas and other States have provided for the trial of public claims by the Courts. The United States has organized a special Court for that purpose.

Whatever jurisdiction this Court has, it has by the free grant and gift of all the people of these United States.

We trust that the people have not suffered the misfortune of lacking a tribunal competent and willing to entertain and adjudicate upon this case.

Fourteenth. We submit that a writ of injunction should issue as prayed for.

MASON W. TAPPAN,
Att'y-Gen'l of New Hampshire,
WHEELER H. PECKHAM,
Of Counsel for Complt.

NH 108-76

OFFICE SUPREME COURT U.S.
FILED
JAN 3 1881
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

THE STATE OF NEW HAMPSHIRE

against

THE STATE OF LOUISIANA and others.

COMPLAINANT'S BRIEF

ON FINAL HEARING.

MASON W. TAPPAN,
Attorney-General of the State of New Hampshire,
WHEELER H. PECKHAM,
Of Counsel for Complainant.

BURGOYNE, Law Case Printer (Law Telephone 590), 29 Rose Street.

BURGOYNE (Telephone No. 590), 29 Rose St.

Supreme Court of the United States.

THE STATE OF NEW HAMPSHIRE

against

THE STATE OF LOUISIANA and others.

Original.

This is an original bill filed in this Court to enjoin the diversion, by the individual defendants, who are Governor, Secretary of State, &c., of the State of Louisiana, of a fund pledged by the State of Louisiana to the payment of the interest on its bonded debt from the purpose to which it was pledged to the general uses of the State Government.

Statement.

The bill of complaint in this case is filed on the following state of facts:

In 1874 the Legislature of the State of Louisiana passed an act known as Act No. 3 of the Laws of 1874. It is found on page 39 of the Session Laws of 1874, and is in these words:

"No. 3.] AN ACT

"To provide for funding obligations of the State by exchange for bonds; to provide for principal and interest of said bonds; to establish a board of liquidation; to authorize certain judicial proceedings against it; to define and punish violations of this act; to prohibit certain officers diverting funds except as provided by law, and to punish violations therefor; to levy a continuing tax and provide a continuing appropriation for said bonds; to make a contract between the State and holders of said bonds; to prohibit injunctions in

certain cases; to limit the indebtedness of the State, and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws.

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisana in General Assembly convened*, That for the purpose of consolidating and reducing the floating and bonded debt of the State, the Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State and Speaker of the House of Representatives are hereby authorized to cause to be prepared, and to issue bonds, to be known as 'consolidated bonds of the State of Louisana,' of the denominations of one hundred, five hundred and one thousand dollars, to the amount of fifteen millions of dollars, or so much thereof as may be necessary, all payable forty years from the first day of January, 1874, and all to be numbered consecutively, and made payable to bearer, and to bear interest at the rate of seven per cent. per annum, payable semi-annually in the City of New York and City of New Orleans, on the first day of July and January of each year, and coupons for such interest shall be annexed thereto; said interest and principal to be payable in lawful money of the United States.

"SEC. 2. *Be it further enacted, etc.*, That the parties designated in the foregoing section shall constitute a board of liquidation, and a majority of said board shall elect a fiscal agent for the State, who shall be a member of said board.

"SEC. 3. *Be it further enacted, etc.*, That the bonds authorized by section one shall be signed by the Governor, Auditor and Secretary of State, and the coupons shall be signed by the Auditor and Treasurer; and when so prepared said bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the State and all valid

warrants drawn previous to the passage of this act by the respective Auditors of Public Accounts of the State on the Treasurer thereof, except warrants issued by the Auditor in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants; *provided*, that the holder of any bond or valid warrant rejected by a majority of said board may apply by petition to the proper Court for relief, and if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided by this act; *and provided further*, that if any member of said board of liquidation shall knowingly audit and fund any illegal claim against the State, he shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined not less than five thousand dollars and be imprisoned not less than two years, at the discretion of the Court. And any person knowingly procuring the same to be done shall be subject to the same penalty.

"SEC. 4. *Be it further enacted, etc.*, That the exchange of the bonds or valid warrants authorized by this act shall be affected by said board of liquidation in the cities of New Orleans and New York.

"SEC. 5. *Be it further enacted, etc.*, That the consolidated bonds herein authorized shall be held and used by said board of liquidation only for the purpose of exchange as aforesaid; said bonds shall be used for no other purpose or purposes than as authorized by this act, and any member of the board of liquidation using or attempting to use, or attempting to induce any person or persons to use, said bonds or any of them for any other purpose or purposes shall, on conviction thereof, be punished by a fine of not less than five thousand dollars and by imprisonment at hard labor for not less than one year.

"SEC 6. *Be it further enacted, etc.*, That notice of the adoption of this act shall be published by said

board in one or more journals of New Orleans, New York, London, Paris and Amsterdam.

"SEC. 7. *Be it further enacted etc.*, That a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied, and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose, and no other. And that it shall be deemed a felony for the Fiscal Agent or any officer of the State or board of liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years nor less than two, at the discretion of the Court. If there shall, during any year, be a surplus arising from said tax after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchases to be made by the said board of liquidation, from the lowest offers, after due notice; *provided*, that the total tax for interest and all other State purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the Auditor and Treasurer, and the said board, respectively, to collect said tax annually, and pay said interest and redeem the said bonds until the same shall be fully discharged.

"SEC 8. *Be it further enacted, etc.*, That the bonds and valid warrants outstanding at the time of the passage of this act shall, as fast as they are received in exchange for consolidated bonds, be cancelled and destroyed by the said board of liquidation,

and consolidated bonds purchased, as provided for in section seven of this act, shall be canceled and destroyed after public notice has been given of the same in the official journal of the State, in the presence of as many citizens as may desire to be present, in like manner, and within ten days after such destruction, in each case, a *proces verbal* of the same shall be published and a report made to the General Assembly on the first Monday of every year, by said board.

"SEC. 9. *Be it further enacted, etc.*, That it shall be the duty of the Auditor in his next annual report to give a detailed account of the proceedings had under this act, including the amount of new bonds issued, the amount of old bonds and valid warrants canceled, the amount of the same outstanding, and the cost of the exchange; and annually thereafter a full and exact statement of the condition of the public debt under the operations of this act.

"SEC. 10. *Be it further enacted, etc.*, That any judge, tax collector, or any officer of the State, obstructing the execution of this act, or any part of it, or failing to perform his official duty thereunder, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment not exceeding five years, and by fine not exceeding two thousand dollars, at the discretion of the Court; *provided*, that this section shall in no wise prejudice or affect the criminal proceeding under section five of this act.

"SEC. 11. *Be it further enacted, &c.*, That each provision of this act shall be, and is hereby declared to be, a contract between the State of Louisiana and each and every holder of the bonds issued under this act.

"SEC. 12. *Be it further enacted, etc.*, That all grants of State aid heretofore made, whether of bonds, indorsements, subscriptions of stock, or otherwise, which have become lapsed or forfeited, be and the same are hereby repealed and annulled, nor shall the State hereafter modify, novate, or

extend any contract heretofore made for the giving of State aid in any form or under any pretext.

"SEC. 13. *Be it further enacted, etc.*, That the entire State debt, prior to the year of our Lord nineteen hundred and fourteen, shall never be increased, directly or indirectly, beyond the sum of fifteen millions of dollars, hereby authorized, it being the intent and object of this act, and of the exchanges to be effected thereunder, to reduce and restrict the whole indebtedness of the State to a sum not exceeding fifteen millions of dollars, and to agree with the holders of the consolidated bonds to be issued hereunder that said indebtedness shall not be increased beyond said sum during said period.

"SEC. 14. *Be it further enacted, etc.*, That any tax-collector, who shall turn over any money or warrants by him collected, to any person except to the State Treasurer, shall be deemed guilty of a misdemeanor, and shall, on conviction, be subject to the penalties prescribed in section ten of this act, and shall, in addition thereto, be liable in damages in double the amount so turned over; and any State officer requiring or demanding that said taxes shall be turned over to him, except the Treasurer of the State, shall be liable, on conviction, to the same penalties as are prescribed in this section.

"SEC. 15. *Be it further enacted, etc.*, That from and after the passage of this act until the first day of July, 1874, all valid Auditor's warrants issued for debts due prior to January 1, 1874, shall be received for all back taxes, licenses and interest and penalties thereon due prior to said first of January, 1874, except two mills for school fund, three mills for levee construction and repair fund, and two mills to the interest fund for the purpose of paying any interest in arrears accruing on the bonded debt of the State prior to the passage of this act.

"SEC. 16. *Be it further enacted, etc.*, That no court, or judge thereof, shall have power to enjoin the payment of principal or interest of any bond is-

sued under this act, or the collection of the special tax therefor, or to enjoin any officer of State or parish in receiving warrants, as is prescribed in section fifteen of this act.

"SEC. 17. *Be it further enacted, etc.*, That all acts or parts of acts in conflict with this act, or any section thereof, are hereby declared to be repealed, and that this act shall take effect from and after its passage."

Immediately after the passage of this act, the State of Louisiana adopted the amendment to its Constitution, found on pages 42 and 43 of the Session Laws of 1874, which is in these words:

"No. 4.] AN ACT

"Proposing amendments to the Constitution of the State of Louisiana.

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened (two-thirds of the members of each house agreeing thereto)*, That the following amendments be proposed and entered upon the respective journals of the Senate and House of Representatives, with the yeas and nays taken thereon, and the Secretary of State shall cause the same to be published three months before the next general election for representatives to the General Assembly, in at least one newspaper in every parish of the State in which a newspaper shall be published. And said proposed amendments shall be submitted to the people at said election in such manner and form that the people may vote for or against each amendment separately—*i. e.*, 'first proposed amendment, for approval,' or 'against approval,' and in like manner as to the others; and if a majority of the voters at said election shall approve and ratify such amendment or amendments, the same shall be appropriately numbered and become a part of the Constitution, and be proclaimed as such by the Governor and Secretary of State.

"PROPOSED AMENDMENTS TO THE CONSTITUTION.

"No. 1. The issue of consolidated bonds authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in nowise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury.

"No. 2. Whenever the debt of the State shall have been reduced below twenty five million dollars, the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased; and this rule continue in operation until the debt is reduced to fifteen million dollars, beyond which it shall not be increased, nor shall taxation for all State purposes, excepting the support of public schools, ever exceed twelve and a half mills on the dollar of the assessed valuation of the real and personal property in the State, except in case of war or invasion.

"No. 3. The revenue of each year derived from taxation upon real, personal and mixed property, or from licenses, shall be devoted solely to the expenses of the said year for which it shall be raised, excepting any surplus remain, which shall be directed to sinking the public debt. All appropriations and claims in excess of revenue shall be null and void,

and the State shall in no manner provide for their payment."

By these laws it appears that an issue of fifteen millions of dollars of bonds was authorized, a tax levied to pay the interest and principal, the proceeds definitely appropriated to that purpose, the diversion to any other purpose specially prohibited, each provision in the law declared to be a contract between the State of Louisiana and *every holder* of the bonds issued under the act, Courts forbidden to enjoin payment and *directed* to aid in the execution of the act, and disobedience to the provisions of the act made a crime.

Special attention is requested to the seventh, tenth, eleventh and sixteenth sections of Act No. 3, and to the first section of the constitutional amendment of 1874.

Under this act and Constitution the State of Louisiana issued the bonds in question, a coupon on which fell due on the first of January, 1880.

The defendants now propose not to pay that coupon, and to use the money appropriated and collected for that purpose for the general uses of the State.

The evidence of this is the adoption by the State of Louisiana, in 1879, of a new constitution, the portion of which called the "Debt Ordinance" is in these words:

"STATE DEBT.

"ART. 1. *Be it ordained by the people of "the State of Louisiana, in Convention assem-"bled*, That the interest to be paid on the con-"solidated bonds] of the State of Louisiana "be and is hereby fixed at two per cent. "per annnm for five years from the first of "January, 1880, three per cent. per annum for fif-"teen years and four per cent. per annum there-"after, payable semi-annually; and there shall be "levied an annual tax suficient for the full pay-"ment of said interest, not exceeding three mills,

"the limit of all State tax being hereby fixed at six "mills; *provided*, the holders of consolidated bonds "may, at their option, demand in exchange for the "bonds held by them, bonds of the denomination of "five dollars, one hundred dollars, five hundred "dollars, one thousand dollars, to be issued at the "rate of seventy-five cents on the dollar of bonds "held and to be surrendered by such holders, the "said new issue to bear interest at the rate of four "per cent. per annum, payable semi-annually.

"ART. 2. The holders of consolidated bonds may "at any time present their bonds to the Treasurer "of the State, or to an agent to be appointed by the "Governor—one in the City of New York and the "other in the City of London—and the said Treas-"urer or agent, as the case may be, shall indorse or "stamp thereon the words, 'interest reduced to "two per cent. per annum for five years from "January 1, 1880, three per cent per annum for "fifteen years, and four per cent. per annum there-"after'; *provided*, the holder or holders of said "bonds may apply to the Treasurer for an exchange "of bonds, as provided in the preceding article.

"ART. 3. *Be it further ordained*, That the cou-"pon of said consolidated bonds falling due the "first of January, 1880, be and the same is hereby "remitted, and any interest taxes collected to meet "said coupon *are hereby transferred* to defray the "expenses of the State government."

Article 209 of said Constitution is in these words:

"ART. 209. The State tax on property for all pur-"poses whatever, including expenses of Govern-"ment, schools, levees and interest shall not exceed "in any one year six mills on the dollar of its as-"sessed valuation, if the ordinance regarding the "bonded debt of the State is adopted and ratified "by the people; and if said ordinance is not adopted "and ratified by the people, said State tax for all

" purposes aforesaid shall not exceed in any one
" year five mills on the dollar of the assessed valua-
" tion of the property; and no parish or municipal
" tax for all purposes whatsoever shall exceed ten
" mills on the dollar of valuation; *provided*, that
" for the purpose of erecting and constructing pub-
" lic buildings, bridges and works of public improve-
" ment in parishes and municipalities, the rates of
" taxation herein limited may be increased when the
" rate of such increase and the purpose for which it
" is intended shall have been submitted to a vote of
" the property taxpayers of such parish or munici-
" pality entitled to a vote under the election laws of
" the State, and a majority of same voting at such
" election shall have voted therefor."

The State of New Hampshire is the owner and bearer of six of the said bonds, under and pursuant to an act of that State, in the following words:

" AN ACT to protect the rights of citizens of this State holding claims against other States.

" *Be it enacted by the Senate and House of Representatives in General Court convened:*

" SECTION 1. Whenever any citizen of the State shall be the owner of any claim against any of the United States of America, arising upon a written obligation to pay money issued by such State, which obligation shall be past due and unpaid, such citizen holding such claim may assign the same to the State of New Hampshire, and deposit the assignment thereof, duly executed and acknowledged in the form and manner provided for the execution and acknowledgment of deeds of real estate by the laws of this State, together with all the evidence necessary to substantiate such claim with the Attorney-General of the State.

" SEC. 2. Upon each deposit being made it shall be the duty of the Attorney-General to examine

such claim and the evidence thereof, and if, in his opinion, there is a valid claim which shall be just and equitable to enforce, vested by such assignment in the State of New Hampshire, he, the Attorney-General, shall, upon the assignor of such claim depositing with him such sum as he, the said Attorney-General, shall deem necessary to cover the expenses and disbursements incident to, or which may become incident to the collection of said claim, bring such suits, actions or proceedings in the name of the State of New Hampshire, in the Supreme Court of the United States, as he, the said Attorney-General, shall deem necessary for the recovery of the money due upon such claim; and it shall be the duty of the said Attorney-General to prosecute such action or actions to final judgment, and to take such other steps as may be necessary after judgment for the collection of said claim, and to carry such judgment into effect, or, with the consent of the assignor, to compromise, adjust and settle said claim before or after judgment.

"SEC. 3. Nothing in this act shall authorize the expenditure of any money belonging to this State, but the expenses of said proceedings shall be paid by the assignor of such claim; and the assignor of such claim may associate with the Attorney-General in the prosecution thereof, in the name of the State of New Hampshire, such other counsel as the said assignor may deem necessary, but the State shall not be liable for the fees of such counsel or any part thereof.

"SEC. 4. The Attorney-General shall keep all moneys collected upon such claim, or by reason of any compromise of any such claim, separate and apart from any other moneys of this State which may be in his hands, and shall deposit the same to his own credit as special trustee under this act in such bank or banks as he shall select; and the said Attorney-General shall pay to the assignor of such claims all such sums of money as may be recovered by him in compromise or settlement of such claims,

deducting therefrom all expenses incurred by said attorney not before that time paid by the assignor.

"SEC. 5. This act shall take effect on its passage.

"Approved July 18, 1879."

The complainant files its bill to enjoin the diversion of the money raised to pay the coupons of January 1st, 1880, to any other purpose.

The answers of the defendants are substantially pleas to the jurisdiction of this Court, and the question raised by the answers and stipulation is whether a State can take an assignment from its citizens and thereupon maintain a suit in this Court. Should it be held that it can, there arises the further question, whether complainant is entitled to the relief demanded.

Argument.

First. The record shows a controversy of which this Court has jurisdiction.

(*a*) The word "controversy," in Sec. 2, Art. 3, of the Constitution of the United States, includes controversies arising on contract.

See U. S. vs. Bank, 15 Peters, 377–392.

It is used where private persons only are affected, as "between citizens of different States," and is the word used when granting jurisdiction dependent on the parties.

There is, therefore, by mere reading of the Constitution, no more reason to limit jurisdiction over "controversies between two or more States, or between a State and citizens of another State," to controversies respecting boundaries or those of a similar character, or to those not arising on contract, than there is so to limit it over controversies between citizens of different States.

Second. The technical law of party in interest

presents no objection to jurisdiction. The State of New Hampshire has, by assignment and delivery, the legal ownership, and is the bearer of these *negotiable* bonds. Between an ordinary party so circumstanced and an ordinary defendant, no question as to the character or terms of the assignment, whether absolute or in trust, whether taken for the litigation or otherwise, could arise. Payment to such a plaintiff would be a complete legal acquittance, and the defendant could ask no more.

Sheridan vs. The Mayor, 68 New York, 30.
Mercer Co. vs. Hackett, 1 Wallace, 83.
National Bank vs. Texas, 20 Wallace, 72.

Opinion of the late Judge Curtis on right of mere holder of municipal corporation scrip to sue in his own name. Life and Writings of Curtis, vol. I., p. 284, and specially 288 to 291 *et seq.*, and authorties cited.

Edwards on Bills, 130–132.

The head note in the case in 68 New York, 30, is as follows:

"A plaintiff suing upon an assigned claim is the real party in interest under the Code, if he has a valid transfer *as against the assignor*, and holds the legal title to the demand; the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor."

And see Opinion, p. 32.
See also Hays vs. Hathorn 74 N. Y, 486, and cases cited.

The principle established by the cases is that he is the legal owner and entitled to sue, payment to, or a recovery by, whom would protect the defendant.

Third. Following this technical or artificial reasoning, this suit is well brought.

By taking an assignment, and becoming the holder or bearer of these bonds and coupons, the State of New Hampshire acquired the legal title thereto, and empowered to give valid acquittance to the defendant. A recovery or defeat bars the world.

Having this right on default by the defendant State, or breach of trust by the defendants, individuals, a "controversy" arises within the meaning of the United States Constitution.

Defendants by their answers say that they have had no controversy with plaintiff, save and as advised by the bill of complaint herein.

They would seem thereby to intimate that some sort of prior discussion and negotiation, diplomatic or otherwise, must have taken place, resulting in a "controversy," before jurisdiction can attach in this Court. No such position can be well founded. Between citizens of different States a "controversy" to give jurisdiction arises when one has a cause of action against the other. The commencement of the suit may have been the first knowledge by the obligor of the existence of the obligee: but no one ever heard of a plea by the obligor that, because of that there was no "controversy" between them, and that, therefore, the United States courts had no jurisdiction.

No reason can be suggested why the case to which a State is a party, of which this Court has original jurisdiction, should be founded on a "controversy" of any different character from the "controversy" between individuals.

Suppose a suit brought by a State against an individual on a promissory note. Can it be supposed that, in order to give jurisdiction to this Court, any "controversy" is essential before suit brought other than such as is necessary to maintain an action in any other Court? Clearly not.

Fourth. Before proceeding further, it is well to see what is the precise question, jurisdiction of which by this Court is invoked by the complainant. Its discussion will then, it seems to us, naturally divide itself into two branches.

The question may be thus stated: Complainant alleges that the State of Louisiana issued its bonds to bearer, and created a fund for their payment, and made the individual defendants ex-officio trustees of that fund and charged with its administration. That the individual defendants are about to divert the fund from its pledged purposes. The remedy sought is to enjoin such diversion.

No remedy is sought directly against the State. If the State could not be made a party, a court of equity would proceed without it.

Board of Liquidators vs. McComb, 2d Otto, 531, and cases cited.

It is made a party to enable it to assert any right it may choose to assert in this fund. The complainant's claim, however, *is to this fund*, and is of the same character as if it were to a piece of land, or to a ship, or to any other property in the hands of an individual, and to which the State might assert a claim.

That the claim is well or ill founded is another question. All we now state is that that is the claim.

We propose to discuss the question of jurisdiction of this claim in two branches: 1st, Supposing the complainant to be the absolute owner for its own use of the six bonds and coupons; and, 2d, In the light of her ownership, under the law set out in the answers of defendants.

1st. That in the first case, this Court would have jurisdiction, seems settled by the case of *Texas vs. White* (1st Wallace, 700).

That was a bill filed by the State of Texas against certain individuals, to enjoin their collecting certain United States bonds and to obtain an adjudication

that the bonds be delivered up to complainant, and relief was granted.

Relief of a similar character to that here prayed for was also granted in *Board of Liquidators vs. McComb* (2d Otto, 531).

Indeed, that an individual owner of these bonds could maintain a bill for the relief here prayed for against the individual defendants seems clear, on principle and authority, though for a fuller discussion of that point we refer to a subsequent part of our argument.

That being so, we have the premiss that the judicial power of the United States extends to such questions.

The clause giving certain original jurisdiction to this Court neither enlarges nor restricts the grant of "judicial power of the United States."

It merely defines the Court by which it shall be exercised.

If, then, the State of New Hampshire sues in this Court for precisely the same relief as would be granted to an individual in the Circuit Court, the State of New Hampshire is entitled to that relief from this Court.

If not, it must be for lack of right in the State, and not for lack of jurisdiction in the Court.

Let us see, then, as to the right of the State of New Hampshire.

A contract or obligation requires two parties—an obligor and obligee.

That the State of Louisiana had power to issue these bonds, and to enact the law under which they were issued, and to impose on her officers the duties and trusts by that law imposed, and that individuals assuming such offices thereby assumed such duties and trusts, is, of course, beyond discussion.

That the holders and bearers of such bonds became the other party to such contracts and obligations is also beyond discussion.

If, now, the State of New Hampshire could legally become the owner and bearer of these bonds, it must

logically and practically follow that she may invoke in and by this Court the exercise of that "judicial power of the United States" which by other suitors would be invoked in the lower Courts.

The question, then, is resolved into one, whether the State of New Hampshire has capacity to acquire and become the holder and bearer of these bonds.

Unless there is something in the Constitution to prevent, a State may acquire and own the negotiable obligations of any political community, or of any corporation, political, municipal or private.

Mr. Curtis says: "It is incident to the sovereign power that it should be able to make itself the owner of such claims" (Life of Curtis, vol. 2, p. 146).

In *Texas vs. White* (1 Wallace, 700) the subject matter of the controversy was bonds of the United States owned by the State of Texas.

Upon the question of capacity of a State to become the owner of bonds no distinction is perceived between bonds of the United States and of a sister State.

It certainly is incident to the sovereign power both to draw and purchase bills.

United States vs. Bank, 15 Peters, 377.

Where one sovereign may purchase and another may make bills, surely one may purchase the bills of the other.

No distinction is perceived between bills and bonds.

Nor does subdivision 1, section 10, article 2, of the Constitution, which forbids a State to "enter into any agreement or compact with another State" affect the right of complainant to hold these bonds.

The compacts or agreements intended are those of a political nature, such as could be made between sovereigns only. It does not forbid ordinary business agreements such as could be transacted between individuals, least of all was it intended to for-

bid the purchase and ownership by one State in the open market of the securities of another.

Union Branch R. R. Co. vs. East Tenn. & Geo. R. R., 14 Georgia Rep., 327; 2d Story Com., §§ 1354–5, 1401–2–3.

A promise to pay money is not an agreement of the character intended to be prohibited.

In the beginning of its existence, this Court, by Mr. Justice Wilson, said: "A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, willfully refuses to discharge it. The latter is amenable to a court of justice upon general principles of right. Shall the former, when summoned to answer the fair demands of its creditors, be permitted, Proteus-like, to assume a new appearance and to insult him and justice by declaring, *I am a sovereign State?* Surely not."

4 Dallas, p. 456.

In these present years it speaks the same language: "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons."

96 U. S. Rep., 445.

Mr. Chief Justice Taney, in *Holmes vs. Jennison* (14 Peters, 572), following Vattel, gives to the words "compact and agreement" a meaning differing in degree, but not in kind, from the word treaty; and Mr. Justice Story says, in arriving at the same result, that the maxim "*noscitur à sociis,*" applies.

2d Story on Const., §§ 1402–3.

It would seem clear that to the case of negotiable bonds issued by a State to individuals, this constitutional clause has no application.

The compact or agreement made in these bonds,

so far as the State is concerned, is made with the individuals who take the bonds. One of the features of that contract, given to it by the commercial law, is that it is assignable, and that the assignee takes not only an equitable, but a legal, title and can sue in his own name.

The two States make no contract—an individual assigns to one State a contract he has made with another.

To say that a State could not thus become the assignee of a contract would be going much further than in the illustration put in 14 Georgia, that a State could surely sell to another State a locomotive or other personal property having no political characteristics, without consulting Congress. Suppose a State, a creditor of one of its own citizens, who had bonds of another State and nothing else, and the bonds unsalable because of threatened repudiation, can there be any doubt of the right of the State to take the bonds in payment or on account of the claim? Surely not!

If, then, complainant can become the owner and holder of these bonds, surely it is entitled to the same remedies in this Court to which an individual owner would be entitled in the Circuit Court.

It is not necessary in this case to pass upon the question whether the complainant would be awarded a judgment *quod recuperet* in a simple action at law against the State of Louisiana on these bonds.

An individual could, of course, recover no such judgment.

The complainant asks a judgment against individual defendants to enjoin the diversion of a fund held in trust to pay these bonds. Without having originally entered into any compact or agreement with the defendant State, it has become the assignee and owner and holder of these bonds, for payment of which the individual defendants hold a fund, and which fund they propose to divert.

This fund is the primary fund for the payment of

these bonds, and its diversion may be stayed at the suit of any party interested.

None of the difficulties as to execution of any decree passed herein that were apprehended in the early cases (*e. g. Chisholm vs. Georgia*) can here exist.

The decree will go against the *individual defendants.*

The State of Louisiana is made defendant, not so much to obtain a definite judgment against the State as to obviate any objection that might be made, that the principal is not before the Court in a case where the Court has jurisdiction of the principal. Such objections were made in the cases in 9 Wheaton (*Osborne vs. The Bank*) and 16 Wallace (*Davis vs. Gray*), and this Court answered them, by saying that the action would be against the State officers without the presence of the State or principal where the Court had no jurisdiction to bring in the principal.

It would be singular if, in a case where the Court had jurisdiction of the principal, making the principal a party, should oust jurisdiction as to all.

2d. Nor does the fact that the complainant has become the owner and holder of these bonds, under and pursuant to the act stated in the answers, oust the jurisdiction.

The question has recently been discussed in a most able and exhaustive manner by Hon. Bradley T. Johnson, of Virginia, in the "American Law Review" for July, 1878.

It was also discussed during the last proceeding era of repudiation in our country in the "North American Review" for January, 1844, by the late Mr. Justice B. R. Curtis, of this Court.

The article of Mr. Curtis is also published in his life by his son, B. R. Curtis, of Boston (vol. 2, p. 93 *et seq.*). Much the larger portion of this article is devoted to the consideration of the financial condition of the several States. The question of remedy occupies but a few pages at the end.

The argument is so terse and cogent that we transcribe it entire:

"The views which we have thus far presented respect our domestic condition and policy; but the subject has a direct connection with the foreign relations of the United States.

"It has always been admitted to be one of the duties, and consequently one of the rights, of the sovereign power in every nation, to see that gross injustice be not done to its subjects or citizens in a foreign country.

"If the injustice be of such a nature as to admit of legal remedy, and the courts of the land where it is done are open for redress, the sovereign is bound to wait till that redress has been sought for and refused in the highest court known to the law of that country.

"It is presumed that justice will be done according to the course of the law of the land; and this presumption can be removed only by an actual failure to obtain it in the highest court.

"No nation can answer for the equity of proceedings in all its inferior courts.

"It suffices to provide a supreme judicature, by which error and partiality may be corrected.

"This presumption holds even when redress has been refused, unless the decision is palpably wrong —*in re minime dubia*.

"But where the decision against the foreign claimant is evidently unjust, or when the law studiously withholds its aid, so that he cannot obtain the fruits of a decision in his favor, or when the courts of the country are not open to his suit, the foreign sovereign is bound to listen to the complaints of his subject thus injured, and either make indemnification or seek it from the people by whom the wrong has been done.

"It is apparent, therefore, that at no distant day this matter may become the occasion of negotiation with those governments whose subjects are interested in these debts.

" In such an event the preliminary question would " be, whether any Courts of their country are open " to foreigners seeking to recover their money of the " State.

" As a general rule, the Courts of the States can- " not entertain a suit against the States.

" There are only three exceptions known to us, " and those are the States of Mississippi, which al- " lows the holders of her bonds to bring suit against " the State in her own Court of Chancery, and the " States of Maryland and Virginia, which, in some " instances, have allowed suits against themselves, " but always, we believe, by special laws.

" How far the case of Mississippi would come " within the rule of international law, which binds " the claimant to seek for redress in the courts of " the land where the wrong was done, we are not " prepared to say.

" So far as we know, it would be a new case.

" The Chancellor of Mississippi is elected by the " people every six months.

" He is, therefore, appointed by, and directly de- " pendent on, one of the parties to the suit; and the " case has been prejudged by the Legislature.

" Now, if the rule should apply at all, and the par- " ties should be held bound to seek for justice at the " hands of a judge thus situated, it seems clear that " the decision would be much more open to doubt " than in ordinary cases where the foreigner sues a " citizen.

" If the presumption that justice will be done ac- " cording to the law of the land should exist, it " would certainly be weak and easily removed, and " would be quite as likely to lead to disputes and " contentions as to settle them.

" It is manifestly of great importance to us to " have the full benefit of the presumption, which, " for the sake of peace, the law of nations raises " in such cases.

" Without this presumption, the claim for redress " must be made on the Government of the United

" States, and the cases judged of and decided by the
" parties to the negotiation; after which, if the for-
" eign government is not satisfied with the result, it
" has just cause for reprisals and even for war.

" With it the matter is first submitted to the high-
" est legal tribunal; and the foreign government is
" bound to be satisfied with its decision, unless so
" palpably wrong as to give rise to the belief that it
" was corruptly made.

" We have said that the claim for redress must be
" made upon the United States; for we cannot
" entertain the least doubt that the National Govern-
" ment is as much responsible for injustice done to
" foreigners by the States as by individuals or cor-
" porations.

" Foreign states can know only that sovereign
" which has the power to make war and peace, to
" negotiate and enter into treaties.

" They can no more have relations with a State
" than with a county.

" If the wrong is done within the territory of the
" United States, the United States must answer
" for it.

" But we believe our Constitution has not left us
" without the protection which is enjoyed by all
" other nations who have courts of justice open to
" foreigners seeking redress, and where they are
" bound to presume that justice will be done.

" The Constitution, as originally adopted, con-
" tained, in Art. III, sec. 2, the following words:

" 'The judicial power shall extend to controversies
" between a State, or the citizens thereof, and for-
" eign states, citizens or subjects.'

" The eleventh article of the amendments declares
" that 'the judicial power of the United States shall
" not be construed to extend to any suit in law or
" equity commenced or prosecuted against one of
" the United States by citizens of another State,
" or by citizens or subjects of any foreign state.'

" Thus the original provision as to suits against

" one of the United States by foreign states was al-
" lowed to stand.

" Mr. Chief-Justice Marshall, in his very able
" opinion in the case of *Chisholm vs. The State of*
" *Georgia*, has stated the reason of this provision
" in such a manner as renders it quite applicable to
" our present purpose.

" He says the Constitution contained this provis-
" ion 'because, as every nation is responsible for
" its citizens towards other nations, all questions
" touching the justice due to foreign nations or peo-
" ple ought to be ascertained by and depend on
" national authority.'

" There can be no doubt, therefore, that by the
" terms of the Constitution a foreign state or sover-
" eign may sue one of the United States in some
" Court of the United States. Nor has the Constitu-
" tion left it doubtful, or even left it for Congress to
" provide, which Court it shall be, for it contains the
" following words:

" 'In all cases affecting Ambassadors, other pub-
" lic ministers and Consuls, and those in which a
" State shall be a party, the Supreme Court shall
" have original jurisdiction.'

" We conceive, also, that a foreign state or sover-
" eign may easily be placed in such a condition as to
" prosecute these claims. It is incident to the sover-
" eign power that it should be able to make itself
" the owner of such claims.

" The rules as to the purchase and sale of rights
" of action which affect individuals are not applic-
" able to the sovereign. The lawpresumes that the
" Government of a country will not be guilty of
" champerty or maintenance. Under the common
" law the king might take an assignment of a debt,
" and sue therefor in his own name. And we have
" no doubt that the same law exists in all countries.
" It seems to follow, then, that if the sovereign
" should take an assignment of a claim and sue
" therefor in the court of a foreign country, the
" comity and respect due to the foreign sovereign

"would necessarily prevent the Court from inquir-
"ing into the causes and motives of the assignment,
"especially in a country where the common law
"exists which makes all debts negotiable between
"the sovereign and a subject or citizen.

"And if this motive were inquired into, it would
"appear that the foreign sovereign had taken the
"assignment merely to discharge a duty to his sub-
"jects by affording to them a remedy for a
"supposed wrong.*

"Certainly it would not be a subject of complaint
"or regret on our part that this course should be
"taken, and that the foreign sovereign should sub-
"mit the question to the decision of our own highest
"tribunal, instead of resorting directly to negotia-
"tion.

"In the event of such a thing becoming necessary,
"we should look upon an application to the Supreme
"Court of the United States as not only practicable,
"but desirable, and we should feel thankful for the
"existence of that principle in the public law, and
"that wise provision in our own Constitution, which
"enables us to ask foreigners to seek for justice in
"thathigh tribunal which is created to establish it
"—a tribunal known to the world as elevated far
"above all States' biases and prejudices; whose
"members come together from the North and the
"South, from the East and the West, across dis-
"tances wider than half of Europe, and listen to
"sovereign States, as they contest their claims to
"territory and jurisdiction; a tribunal which sits
"in judgment on the acts of the Legislature of the
"nation, and decrees them to be valid or void; a

* It has sometimes been suggested, in answer to the view taken by us, that the Judiciary Act has so limited the jurisdiction of the courts of the United States that an indorsee or assignee of a chose in action cannot sue in these courts, unless the assignor or indorser could himself sue therein; but that limitation has reference only to suits in the Circuit and District Courts. It does not touch the original jurisdiction of the Supreme Court, which is conferred by the Constitution and is not within the control of Congress.

" tribunal which is our own ark of safety, and to
" which offended Europe may come confidently and
" obtain such justice as war and reprisals never gave
" and never can give.

" We have now presented our views of this im-
" portant subject.

" We fear that intelligent men throughout the
" country have hitherto scarcely done their duty in
" regard to it.

" They have looked upon it as interesting only
" those States which are embarrassed by debts, and
" those which have taken false steps to escape from
" them. They have thought it a matter of national
" concern only because it affects our character as a
" people.

" But they must no longer forget that the rights
" of every honest man are violated by an unjust
" act of the government under which he lives.

" It has been thought to be one of the advantages
" of a free government that the individual is not
" merged in the State, that each citizen is regarded
" and cared for, not merely because important to
" the State, but for the sake of his own welfare and
" happiness.

" For him, as a man, laws are enacted; for him
" rights exist; for him remedies are provided.

" He stands before all tribunals capable of claim-
" ing whatever is just.

" He means not to identify himself with any
" class, or community, or corporation.

" As a citizen, he has all the rights which can be
" had; and, among those rights, he has eminently
" that of requiring the government of which he is
" a constituent part, to do nothing which shall stain
" his honor, or shock his sense of justice, or lessen
" his patriotism, or deprive him of his share of the
" glory of his country, and if any public act does
" this, he has as much right to feel aggrieved as if
" his personal liberty were infringed.

" It is true he walks abroad unharmed in his per-

" son, but a violent constraint has been put upon his " love of justice.

" It is true his house and land are untouched; but " his country's glory, for which he would at any " time have sacrificed them, has been squandered " and lost.

" He still has a country, but that which made it " lovely in his eyes has been defaced and destroyed.

" Let every honest man, then, take care to do " what in him lies to protect himself from this great " wrong, and never rest until the faith of his " country has been redeemed, and its honor secured " from reproach."

(See also opinion on same subject given in August, 1860, Vol. 1st, p. 281).

From a letter of Mr. Justice Story, found on p. 102, Vol. I, of the life of Mr. Curtis, it seems that the views expressed in the article met with the warm approval of that eminent jurist.

One of the difficulties suggested by Judge Curtis is in a State's obtaining a legal title to a *chose in action*. The accomplished writer overcomes it by reference to the common law doctrine of England and continental Europe, that all claims are assignable to the king. In the case at bar, the bonds being negotiable, that difficulty does not exist.

The article of Mr. Johnson is too long for transcription. The points of his argument may be thus briefly stated:

(1) By common and international law, no citizen of one sovereignty or State can sue in the Courts of his own country any other State or sovereignty, nor could he sue such other State in its own Courts.

(2) By the same common and international law sovereigns may assert, maintain and collect the claims of their citizens against other sovereigns or States.

These propositions he shows to be undisputed, either in diplomacy or law, citing *Smith vs. Weguelin* (8 L. R. Eq., 198); *Nathan vs. Virginia* (Notes to 1 Dallas, 71); *The Exchange* (7 Cranch, 116), and

many other cases as to the first point; and *Vattel Lit. 2* (Chap. 6, Sec. 71); *2d Phil. Inter. Law, 8*, and the resolutions and circular of the English Government with reference to British subjects holders of unpaid foreign bonds in 1848, on the second point.

We may add the reference to the action of our own government on the familiar cases of the Alabama claims and the Fisheries award.

(3) That by Article 9 of the Articles of Confederation the Congress was made a tribunal of last resort to settle "all disputes and differences * * * between two or more States concerning boundary, jurisdiction, *or any other cause whatever*," and a procedure prescribed.

(4) This power in Congress was found ineffectual for the same reason that the Confederation was found ineffectual as to all other powers. Congress could decide, but it could not enforce; adjudge, but not execute.

(5) The principal purpose and feature of the Constitution was to supply this deficiency, and it would seem clear that in extending the judicial power of the United States to controversies between States, the States meant to grant their whole power to the United States.

"The States had the right to decide upon controversies between themselves, and the right to enforce their determination by war. This power and right, 'unimpaired by any act and controlled by no authority,' they delegated to the Union."

(6) For that purpose the grant of judicial power to the United States in the Constitution was made. It included the right of a citizen of one State to sue another State in assumpsit, citing *Chisholm vs. Georgia* (2 Dallas, 457).

(7) The doctrine of *Chisholm vs. Georgia*, that a State is not sovereign as to her contracts, that she may be sued on such contracts remains undisputed to the present day (citing many cases).

(8) The Eleventh Amendment was the act of the

States, and by it they resumed their responsibility under the laws of nations, to protect the rights of their citizens; "and thenceforward it became their "duty to use the power retained by them and the "remedies given to them under the Constitution, "to enforce the rights of their own citizens" (p. 652).

(9) The limitation of the Constitution was that those rights, instead of being enforced by diplomacy and war (the ordinary and only means of sovereigns), must be enforced through the judicial power of the United States, or by negotiation, with the consent of Congress.

(10) That, independently of Congress, this Court, in matters of original jurisdiction, has power to regulate its procedure and to enforce its decrees.

It is impossible to do justice to the force and cogency of the argument of Mr. Johnson by any abridgment thereof or statement of its points. We therefore beg of the Court the attentive consideration of the argument itself.

The case of *Chisholm vs. Georgia* definitely decided the construction of the grant to the United States of judicial power in "controversies between two or more States," and "between a State and citizens of another State."

The construction was, that "the *controversy* arising, it matters not what the subject matter may be, the Court will entertain and enforce jurisdiction."

Johnson's Article, p. 651, and cases cited.

In the Chisholm case the strongest effort was made to limit the plain, natural meaning of the words that made the jurisdiction depend upon parties by the technical law existing in the States prior to the adoption of the Constitution.

The various constructions that had been given to the clause in the Constitution were all cited and commented on by Court and counsel, and the construc-

tion given in accord with the plain, natural meaning of the words.

Mr. Justice Iredell, in his dissenting opinion, strongly argues that the controversies between a State and citizens of another State, to which the judicial power extends, should be limited by reference to antecedent laws for the construction of the words used; and that inasmuch as no antecedent laws gave a right of action against a State, none should exist under the Constitution.

The Court, however, declined the construction according to antecedent laws.

All the Judges, except Mr. Justice Iredell, dissenting, take the broader view and adopt the more liberal construction, that the Constitution of the United States was intended as, and actually was an improvement on and in advance of other forms of government theretofore adopted. One of its great objects was to eliminate from the people forming the Union the ordinary results of animosities and controversies between States, and between the citizens of different States. For such animosities and controversies diplomacy and war had theretofore been the very unsatisfactory remedies. To effect this result a common arbiter and tribunal were necessary. It was provided for in the judicial power of the United States.

The language of Ch. J. Jay (p. 478) in that regard, is admirable to the last degree: "I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not now the case, ought not to be thus collaterally and incidentally decided; I leave it a question."

In the subsequent case of *Rhode Island vs. Massachusetts* (12 Peters, 657), this Court held that it had jurisdiction of a disputed question of boundary, and to the objection that such a question was political in character, answered that though in other

countries and as a question between other political corporations, it undoubtedly was a political question, *i. e.*, to be decided by the ordinary means of diplomacy or war, yet that the Constitution had with us made it a judicial question by providing for its solution by the courts (see p. 736 *et seq.*).

And the doctrine was affirmed in the recent case of *Virginia vs. West Virginia*, 11 Wallace, 39.

Therefore, assuming that the assertion by one State of claims of its citizens against another State would raise a political question, such assumption would be no objection to the jurisdiction of this Court.

Indeed, it is household words that the jurisdiction of courts, both of the States and United States, extends to questions of which the courts of no other country have cognizance, and most, perhaps all, of which are what would elsewhere be regarded as political in character.

Let us for a moment look at the consequences, if this Court has no jurisdiction.

It is clear that no distinction can be made between the suit of one of the States and of a foreign State. The Constitution speaks of both *uno flatú*.

If a foreign State, asserting rights of its citizens, is denied access to the courts, and is also denied negotiation with the State, and feels aggrieved, it may unquestionably, under the law of nations, resort to the United States. In a case like this, the United States could not but acknowledge the justice of the claim.

Unless through the judicial power, the United States would have no means of collecting the sum from the defaulting State. It cannot tax, for taxes must be uniform. It must, then, either itself satisfy the foreign State, or accept the alternative of war.

The foreign State, however, would have its remedy; it could protect and enforce the claims of its citizens—if not through the courts under the Constitution—then by the old means of diplomacy and war.

If the parties injured, however, happened to be citizens of one of our States, they would have no redress. The Eleventh Amendment shuts them out from maintaining their own suits; and if their States are also prohibited from asserting their claims for them in the only way in which, within the Union, claims can be asserted by the "peaceful methods of judicial proceedings," they are without remedy.

By joining and making the "Union," instead of "establishing justice," they have given up the remedy they before had, and have obtained nothing in its place.

They are worse off than the foreigner, who still has the old remedy. They have neither the new nor the old.

Fifth. Suggestions have been made that in controversies between States the jurisdiction of this Court is limited to questions of boundary and cognate questions, and that a State cannot be sued in assumpsit. We submit that they are without foundation.

It is true that the few cases between States that have hitherto been decided in this Court have involved questions of boundary.

In several of these cases objection to the jurisdiction was made, because the question involved political considerations supposed to belong to other departments of the Government.

The answer made was that, although a political question, yet, that, under the Constitution, it was also a judicial question, and must be answered by the Courts.

Rhode Island vs. Massachusetts, 12 Peters, 657.

Looking at the period antecedent to the Eleventh Amendment to the Constitution, we find that the cases brought against States in this Court were cases of assumpsit or on contract.

The Chisholm case was of that character. It

was there held that an action of assumpsit would lie against a State and in favor of an individual.

The Constitutional Amendment which followed that decision was adopted with knowledge of the discussion in the Court, and of the limited construction advocated in the dissenting opinion. Had that construction commended itself to the framers of the amendment, there and then was the opportunity to adopt it.

They did not in any degree limit the subject matter of jurisdiction. They simply denied jurisdiction in any case where a State was defendant and a citizen or subject plaintiff. Except in that special case the jurisdiction was left precisely as before.

No indication can be found of an intent to limit the broad signification which is naturally expressed by the word "controversy," and the language of this Court in decided cases adopts the same unlimited construction.

See 12 *Peters*, 730. "The States submitted to its exercise, waived their sovereignty, and agreed to come to this Court to settle their controversies with each other *excepting none in terms.*"

" 'Controversies between two or more States;' 'all controversies of a civil nature where a State is a party,' are broad, comprehensive terms, by no obvious meaning or necessary implication excluding those which relate to the title boundary jurisdiction or sovereignty of a State."

6 Wheaton, 378, cited and approved, 12 Peters, 723.

"In the second class 'the jurisdiction depends entirely on the character of the parties' comprehending 'controversies between two or more States.' 'If these be parties it is entirely unimportant what may be the subject of the controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union.' "

6 Wheaton, 378, 384, 392-3; 12 Peters, 744.

We refer to these cases where jurisdiction over

boundary was disputed as showing that, in the earlier days, it was precisely boundary questions which were claimed to be without the jurisdiction, while impliedly admitting that civil contracts were within the jurisdiction.

Jurisdiction over boundary questions has long been settled in this Court. *Virginia vs. West Virginia* (11 Wallace, 39). It would be singular now to hold that it is only over boundary and cognate questions that this Court has jurisdiction, and that it has no jurisdiction over cases like the one at bar of a purely judicial character.

Sixth. The existence of jurisdiction in this case is in no respect inconsistent with the highest dignity and sovereignty of the State.

There has never been a time, or a political community, when or where some tribunal has not existed for ascertaining and liquidating claims against the Government. It may have been to the king, or to the Legislature, that the claim must be made; but it could be made somewhere. The very maxim that the king can do no wrong implies that the sovereignty will provide means for ascertaining the justice of claims, and will liquidate them when ascertained.

In England, one of such means was the petition of right which, with an origin wrapped in mystery, has grown in precision and availability, till by the act of 1860 it has become a proceeding almost as familiar as an ordinary action of assumpsit.

The English Secretary of State for War, it was supposed, could always be sued in a common action.

The Court of Exchequer Chamber had jurisdiction

of suits by private persons to adjudge charges on the revenue.

See history of the petition of right in Chisholm vs. Georgia p. 440, including the citation from the Banker's case, Hargrave's case of the Bankers, and 14 State trials.

English Statutes 23d and 24th, Victoria Ch. 34.

Kirk vs. The Queen, L. R., 14 Eq., 563, 565.

Jurisdiction over claims against the Government, however, in England and in our own country, has been generally assumed by and conceded to the Legislature.

Such claims have been regarded rather as administrative or political than judicial questions.

The fact that they are judicial rather than legislative questions has of late years obtained repeated recognition.

The petition of right, Act of 1860, in England, the United States Court of Claims, provisions for the trial by the Courts of such questions in Georgia, Mississippi, Arkansas, Tennessee and other States, all show that the judicial character of these questions is being recognized, and their solution relegated to properly constituted judicial tribunals.

These judicial tribunals, equally with the Legislatures, are created by the sovereignty in which they exist.

No one supposes that the dignity of the State is lessened when such claims are entertained and passed upon by the Legislature.

No one ought to suppose that its dignity is lessened by vesting such jurisdiction in Courts properly organized to administer it, rather than in Legislatures which, by their organization, are wholly unfitted to discharge the duties.

Turning now to the Constitution, we find that the people of the United States have vested in this Court the judicial power that otherwise would be

vested only in the Legislature or tribunals of the State.

They have provided that the "judicial power shall extend to controversies between States."

This judicial power is not exercised in *invitum* against the State of Louisiana, but because she herself, on becoming a member of the Union by her own voluntary act, provided that controversies between her and her sister States should be decided by the judicial power of the United States, as vested in this Court.

It is her own sovereignty that has made this provision, and her dignity is thereby no more impugned than if she had vested it in one of her own Courts, and the suit had been brought there.

Seventh. The Constitution of Louisiana of 1879, in so far as it purports to repeal or amend the Act of 1874, and the constitutional amendment of 1874, is in conflict with the Constitution of the United States, which forbids the passage of any law impairing the obligation of contracts.

On this point there is no room for discussion, and none has ever been attempted.

That the Act of 1874 is a contract is declared in the act and in the constitutional amendment of 1874; and that the holders of bonds issued thereunder are entitled to protection against legislation in conflict therewith has been held by this Court in the case of *Board of Liquidators vs. McComb*, (2d Otto, 531, and cases cited).

The claim of the defendants has been that, though the Constitution of 1879 was the clearest impairment of the obligations of the contract, though to carry out its provisions would be the rankest repudiation, yet that the bondholders are without remedy. That the State is so protected by its immaculate sovereignty that acts which, done by an individual, would be regarded as wholly unjustifiable, must in it go unchallenged. That the duties imposed on the State officers are discretionary in character, and

that the Courts will not control them in the performance thereof.

Eighth. Assuming, then, the invalidity of the provisions of the Constitution of 1879 as affecting the contract, the questions raised are precisely the same as if such Constitution had never been adopted, and the plaintiff had shown by other sufficient allegations that the defendants intended to divert the fund from the payment of coupons to other purposes.

Indeed, the only purpose for which the allegations as to the Constitution of 1879 are inserted in the bill, is to show the certainty that the apprehended diversion will take place unless enjoined.

Therefore the other questions in the case are best considered by treating the Constitution of 1879 as if it had never been passed.

Ninth. The law and Constitutional Amendment of 1874 imposed on defendants the "plain official duty, requiring no exercise of discretion," to collect the tax levied thereby, and to apply proceeds thereof to the payment of these coupons, and not to divert it to any other purpose.

Defendants threaten to violate such duty by the positive official act of diverting the tax collected to other official purposes.

The plaintiff sustaining injury thereby "may have an injunction to prevent it."

2 Otto, p. 541.

In a word, the question is whether *the duty*, a violation of which is threatened, is "a plain official duty, requiring no exercise of discretion," or whether it requires an exercise of discretion.

(*a*) First, let us see what is the duty. Section 7 of the act appropriates the proceeds of the tax to pay the interest and principal of these bonds, and *to no other purpose*, and makes its diversion a

felony, and makes it *the duty* of defendants *to pay said interest*, &c.

Surely the ingenuity of man cannot discover what discretion is involved in the performance of that duty.

Discretion means "the exercise of judgment or prudence."

Is there in this act anything left to the judgment or prudence of defendants in respect to the application or diversion of the proceeds of this tax?

Is it in any way left to defendants to say whether the fund shall be used to pay these bonds or for other purposes?

And if not, what possible question in respect thereto is by the act left to their discretion?

On the contrary the duty is clear, positive, official.

The learned justice of the United States District Court for the District of Louisiana, in deciding the case of Elliottt vs. Nichols (unreported except in newspaper, but printed herewith for convenience of the Court), put himself to the trouble of examining the various duties imposed by law upon the auditor and treasurer as officers of the State of Louisiana, and after citing a number of statutes in relation to their general duties—*e. g.*, that they are members of the executive department; that they are chosen by the people and liable to impeachment; that the auditor must adjust and settle all claims against the State payable out of the treasury, except such claims as may be expressly required by law to be audited by some other person; that he may in his discretion examine under oath parties presenting claims, and other persons, as to the facts of the claims; that in cases of allowed claims the auditor must draw his warrant on the treasurer in a prescribed form; that at the request of any person interested and aggreived by his decision, he must refer the claim presented to be audited by the next General Assembly, and that upon giving a warrant in settlement of any interest coupon he must cancel the same—concludes that there can be no question but that the auditor

and treasurer of the State are executive officers, charged with the exclusive fiscal administration of the State, and having their respective duties clearly defined by its Constitution and permanent (whatever that may mean) laws.

We will grant all that; concede that there are many laws imposing many duties on these officers as to which they have discretion. What relevancy have such laws and such duties to the question at bar?

When and where before was it ever claimed that a plain official duty, requiring no exercise of discretion, was made any the less so by showing that under *other* laws *other* duties which *do* require the exercise of discretion, were imposed on the same officers?

When and where before was it ever claimed that judicial jurisdiction to enforce a plain duty or enjoin its violation, the duty requiring no exercise of discretion, is ousted by showing that the same officer has *other* official duties which do require the exercise of discretion?

On the argument of the Elliott case Court and counsel were challenged to point out any possible discretion vested by the Acts of 1874 in the defendants, in respect to the diversion of this fund from the payment of coupons. None was suggested by counsel, and the Court exhausts itself in showing that by other laws discretionary duties as to other matters are imposed on these officers.

Nor is the learned Justice any more happy in his effort to show that the acts in respect to which defendants were sought to be controlled in that bill and injunction were included in the ordinary duties of their offices.

The chief object of that bill and of the present one is to enjoin the diversion of a fund pledged to the payment of bonds, some of which the plaintiffs held.

That in itself is a legitimate object of chancery jurisdiction.

Any one interested in a fund or property held by

another for his benefit, may maintain a bill to enjoin its diversion.

2d Perry on Trusts, § 816, and cases cited.

Precisely within that familiar principle, this bill is filed to restrain the violation of the "plain official duty, requiring no exercise of discretion," imposed by the Act of 1874—to wit, that this fund should not be diverted.

Whether plaintiff is entitled to other and affirmative provisions, is of no moment in considering its right to enjoin this diversion. This plain official duty, *not* to divert, is the creature of this statute and constitutional amendment alone. It is not included "in the ordinary duties of their offices." It is a special duty created by a special act, as to a special fund and for the benefit of specific persons; and plaintiff may have a decree for that purpose, even though it were entitled to no other.

It has been heretofore suggested—it may again be suggested—that the State officers have not kept this fund, the product of this tax, distinct, but had mingled it in the treasury in a common fund deposited in bank to the credit of the State or its officers.

Were such the fact, they would be pleading their own wrong.

The law sets apart and appropriates to the purpose of paying this interest the fund raised by this tax. It forbids its application to any other purpose. Its diversion is made a felony. In judgment of law the fund *is* set apart, and no officer will be heard to allege otherwise.

If in fact it is not, it must be replaced.

Atty. Genl. vs. Wilson, 1 Craig & Phillips, 1.

It therefore follows that we have nothing to do with what may be the "ordinary duties" of the Treasurer and Auditor of the State, or with questions

whether such ordinary duties are discretionary or ministerial.

Our sole concern is with their duties under this special law and constitutional amendment of 1874, and particularly with the question whether these officers have any discretion to divert the fund from the purpose to which, by the act, it is appropriated.

The learned Justice, in the case referred to, says that the courts cannot interfere with the discretionary duties devolved under the laws on the Treasurer and Auditor, viz., "that, on the part of the Auditor, of determining as to the genuineness of the interest coupons, and that, on the part of the Treasurer, of determining as to the situation of the treasury with reference to the payment of the money upon the same, and that, on the part of both of these officers, of construing the Constitution and the laws with reference to the payments of these demands out of the moneys of the State."

We may admit all this, without in the least affecting our right of action.

We do not propose to take from the Auditor any assumed right to pass on the genuineness of the certificates. To enjoin diversion of the fund—even to command payment of coupons—would have no such effect.

He would still have power to pass on the genuineness of the coupons presented, free from all control of the courts, provided only that in so passing he act in good faith.

Says the Chancellor in *Walker vs. Devereux* (4 Paige, p. 251), where the discretion is vested in certain persons "no Court is authorized to interfere with or control that discretion; *provided it is exercised in good faith.*"

We do not propose to take from the Treasurer the assumed discretion of determining as to the situation of the treasury with reference to the payment of the money upon the coupons.

It may be that the Treasurer has a certain dis-

cretion in the administration of this fund for the purpose of paying the coupons. On the due date of a coupon, sufficient to pay all of that date may not be collected, though he may have enough to pay all on that day presented. Under such circumstances the Treasurer may have some discretion, and this bill does not propose to interfere with it; but the Treasurer has no discretion to divert the fund to *other* uses.

It is such a diversion, as to which there is no discretion, that we seek to enjoin.

And so as to the discretion of construing the laws.

This proposition by itself we wholly deny; but for the argument conceding its soundness, it surely must, as in other cases, be limited by good faith and to a case where there is some room for construction.

There is no room in the act and constitutional amendment of 1874 for the construction that this fund can be diverted from payment of bonds to general State purposes. No such construction can be given in good faith. To do so would be *legislation*, not construction.

And surely it cannot be claimed that these officers have any discretion to construe the Constitution of the United States and to decide what legislative act of the States fall within its prohibitions.

Thus, conceding to these State officers every possible or claimed discretion, it still remains a fact that they have no discretion to divert this fund, and that it is precisely such diversion which this bill seeks to enjoin.

(*b*) It has been claimed, however, that the bondholders have not such an interest in this fund as is necessary to maintain this bill, and that even if they had, there is a certain undefined sanctity pervading the fiscal matters of a State which forbids judicial interference.

It would seem as if recent decisions of this Court had effectually disposed of such questions.

We find, however, that such decisions are very summarily treated by the learned District Judge in Louisiana in the case already referred to.

The learned Judge says that, in *Osborn vs. Bank*, the injunction was to protect specie in the bank vaults; in *Davis vs. Gray*, to prevent a cloud on the title to plaintiff's land, and in *McComb vs. Board* to prevent the value of plaintiff's bonds from being affected by the unauthorized issue of similar bonds to others. To distinguish those cases the Judge says: "But in all these cases the thing that was sought to be *protected* was by law subject to the control of the courts."

The learned Judge then adds, that though the principle of those cases applies to this, yet the courts lack "authority to apply it, because of the exclusive power vested by the State of Louisiana in its Auditor and Treasurer over the fiscal administration of the State."

We submit that the effort of the learned Judge to "distinguish" the case before him from the cases cited is wholly unsuccessful.

The case of *McComb vs. Board* (2d Otto, 531, 541) was substantially identical with the one at bar.

There the property sought to be protected was bonds of the State of Louisiana, issued under this very act, of the same series as those held by plaintiff herein.

So far, then, as concerns the thing "sought to be protected," this and the case then before the learned Judge are *absolutely identical* with the McComb case.

The persons sought to be enjoined were also identical—*i. e.*, the persons who compose the board of liquidators under the act.

This case, therefore, definitely decides two points: 1st. That these consolidated bonds are property, by law, having a right to the protection and subject to the control of the Court. 2d. That the holders thereof have a right: "That the scheme" of the act

and constitutional amendment of 1874 "should be carried into effect as a whole," and that any act inconsistent therewith should be enjoined.

2d Otto, p. 540.

The principle is most concisely stated on page 541: That "when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

It seems idle to argue or to cite authority in support of a principle thus stated by this Court to be settled substantially beyond discussion.

The principle is analogous to, if not identical with, that of a trust where one person has received property for the benefit of another, which, says Mr. Story (2 Equity, § 1196), is the most simple form of an implied trust (§ 1231); "An agreement to *set apart* and pay certain moneys in a certain way raises a *lien or trust on those moneys* in favor of the person for whose benefit the agreement is made" (see also section 1255).

Martin vs. Funke, 75 N. Y. Rep., 134.
Curran vs. State of Arkansas, 15 How., 307.
Hoffman vs. City of Quincy, 4 Wallace, 535.

In *Curran vs. State* (15 Howard, p. 313) this Court said: "If a person deposit his property in the "hands of an agent, he may revoke the agency and "withdraw his property at his pleasure. But if he "should request third persons to accept the agent's "bills, informing them at the same time that he "had placed property in the hands of that agent to

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"meet the bills at their maturity, and upon the "faith of such assurance the agent's bills are ac- "cepted, the principal cannot, by revoking the "agency, acquire the right to withdraw his proper- "ty from the hands of the agent—*it is no longer* "*exclusively his.* They who, on the faith of his "deposit, have changed their condition, have ac- "quired rights in it."

Whether the right to compel public officers to perform ministerial duties in which persons applying are interested be based on and identical with the doctrine of trust, is of little importance. It compels the public officer to perform a duty or abstain from its violation, of which performance or abstention the party seeking relief is the beneficiary. When such duty consists in the administration of a fund, it is hard to distinguish it from a trust, and when a question of discretion arises, it is hard to see why the rules which apply to trustees should not also apply to such officers.

It seems to be claimed, however, that there is something especially sacred in the financial affairs of a State, and that there is necsesarily a larger discretion vested in financial than in other officers.

In that respect it is sought to distinguish this case from the cases of *McComb vs. The Board*, *Davis vs. Gray*, *Osborne vs. Bank*, and cases of that class, and to assimilate it to cases where *mandamus* has been refused against executive officers, such as—

Decatur vs. Paulding, 14 Peters, 497.
Brashear vs. Mason, 6 How., 92.
U. S. vs. Guthrie, 17 How., 284, and similar cases.

It will be remarked that in all these cases it was sought to control the action of the executive officer with respect to the administration of the fund confided to his care *within* the boundaries to which he might apply it.

Take the case of *Decatur vs. Paulding* (14 Peters, 497), where, by the way, the Secretary of the Navy

is by statute designated as the trustee of the Navy Pension Fund.

14 Peters, 514; 4 Stat. at Large, 572.

In that case the effort was to compel the Secretary of the Navy to pay a pension to the plaintiff. There was no question of the administration of the Pension Fund for any other than pension purposes. The whole matter was within the boundaries of the law and the duties of the Secretary of the Navy with respect thereto.

The Court held that the duties as to which action was invoked were discretionary, and not ministerial —three Judges dissenting.

The case of *Brashear vs. Mason* (6 How., 92) was also an effort to make the Secretary of the Navy administer the Navy Fund in accord with what was claimed to be the law of the Fund. It was the case of a mere creditor asking for his pay.

The case of *U. S. vs. Guthrie* (17 How., 284) was similar in character to the last, being the demand of one claiming to be judge for payment of his salary.

But suppose the Secretary of the Navy or of the Treasury had attempted to divert the whole fund intrusted to his care to some wholly foreign purpose, such as, for instance, the establishment of a National Gallery of Art, and had refused to apply it to the payment of any pension or *any* naval or judicial salary! Can it be supposed that an injunction would have been denied to a person legally interested because of anything that was held or even said in those cases?

If we grant in this case to the defendants every possible discretion that was claimed for the executive officers in those cases, it still remains that under no possible circumstances have the defendants the discretion or the right or power to do the thing which the complainant here seeks to enjoin.

The English cases cited are very similar in character.

That of *The Queen vs. Commissioners* (7 L. R., Q. B., 387), cited by the learned District Judge, was a case of a mere ordinary creditor applying for *mandamus* to compel payment of his claim.

That of *The Bankers* (14 Howell's State Trials, 1) was a case of charge upon a special fund, and the charge was sustained and the plaintiff obtained relief. The opinion of Lord Somers, cited by the learned judge below, dissents from the law of the case as finally settled in the House of Lords.

Hargrave's case of "The Bankers," and comments of Iredell, *J.*, in the Chisholm case, 2d Dallas.

In all the cases, both English and American, there was a certain fund at the disposal of the executive officers for distribution among a class, and in all, a person claiming to be of that class asked mandamus in his favor. The broadest possible principle that can be claimed to be established by them is that where a fund is given for the general purposes of the office, courts will not control its *administration* or *distribution within those purposes.*

This distinction is well illustrated in the case of *Murray vs. Earl Clarendon* (L. R., 9 Eq. Cases 20).

Complainant, as diplomat, claimed payment out of the foreign office fund for salary. Lord Romilly, M. R., said: "But the difficulty, or rather the im-
"possibility, of treating it as a trust fund is this:
"That it is paid for the general purposes of the of-
"fice. It is not paid in trust for any particular
"person. The case that was cited was to this ef-
"fect: That if Parliament votes a sum of £1,000
"for *John Smith*, and the treasury devote in their
"books the payment of that sum to other purposes,
"then a mandamus will lie to the treasury to order
"them to pay that £1,000 to *John Smith*. But
"there is nothing of the sort here. Parliament has
"merely voted certain sums to Her Majesty, and of
"these sums £600,000 are to be applied to the
"foreign office. The distribution of that amount

" is left to the officers of the foreign office to apply, " * * * * and there is nothing whatever to " connect the plaintiff with a penny of this money " in any respect."

Again, the distinction is quite as clearly expressed by Lord Cockburn in the very case cited by the learned District Judge, that of *Queen vs. Lord Commissioners* (L. R., 7 Q. B., 394), though in a different way.

" Therefore the question comes to be, whether the Lords Commissioners of the Treasury, when this money gets into their hands are bound to apply it as *the servants of the Crown*, or as the *servants of Parliament* who vote the money."

And the learned Chief Justice goes on to show that the Lords are to apply it as *servants of the Crown*, and therefore mandamus will not lie.

Had, however, the duty been cast on the Lords as the *servants of Parliament* the decision would have been otherwise.

In the same case (p. 397) Judge Blackburn says: " The question remains whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by mandamus, namely, to issue a minute to pay that money; because it seems to me *clear that we ought to grant a mandamus if there is such a statutory obligation.*"

And in *Regina vs. Treasury Commissioners* (16 Q. B., 360, 361) Lord Campbell says: " The claim here being for the arrears of an annuity *granted under an act of Parliament*, and charged upon the consolidated fund, we think the application for a mandamus was regular."

Now, turning to the act and constitutional amendment of 1874 we find a wholly different condition of things.

We find here not only a " statutable obligation cast upon " these defendants to levy and collect this tax and pay the proceeds to bondholders, and not to divert it to any other use, not only a duty cast

on these defendants as the "servants of the" Legislature ["Parliament"], not only a "vote by Parliament of £1,000 for John Smith"—*i. e.*, a vote of the proceeds of the tax to pay bondholders and *no others*—but we find that all this is done in the form and as part of a contract on the faith of which these bonds were issued and taken by the first holders and by complainant.

Can there be a clearer case of trust? Can there be a more positive and definite appropriation by the legislature of a certain fund *to bondholders?* Can there be a more definite duty imposed by the *Legislature* on these defendants to set apart these funds and not to mix them with other funds, and to apply them to the sole purpose of paying interest and principal of these bonds to the holders thereof?

In not one of the cases referred to in this Court or in England was the appropriation a part of the contract on which the services were rendered.

The appropriation was to government to pay for services or materials for which the government might have contracted to pay, but of which contract the appropriation formed no part.

Here the appropriation is part of the contract—made so by express terms. The tax is levied, the money appropriated, payments to be made, all for the specific designated purpose of paying these bonds, and yet these defendants have the audacity to say that a diversion of the funds to general State purposes is within their official discretion.

The case of *Twycross vs. Dreyfus* (5 Law Rep., Ch. Div., 506) has also been referred to.

In that case the money was not in the hands of the agent with statutory or other directions to pay it to plaintiff.

There was no law or even contract imposing on defendants the duty, or even giving them the power or privilege, of paying the complainants, and complainants had no lien on or interest in the fund. Complainants had a *mere bond.* True, *on the back of that bond* was indorsed the information that the

Peruvian Government would appropriate all its revenues to the payment thereof, especially proceeds of sales of guano. No law, however, had made the appropriation or imposed on any officer the duty of paying over such proceeds.

Had the agent been sent the money, with instructions to pay the bonds, no doubt an action would lie against the agent.

Lariviere vs. Morgan, L. R., 7 Ch., 550,
7 Eng. and Irish Appeals, 423.
Lawrence vs. Fox, 20 N. York, 268.
Martin vs. Funk, 75 N. York, 134.

Let us now examine for a moment what acts of State executive officers this Court has restrained, and whether they involved in any degree less of discretion than in the case at bar.

In the McComb case (2d Otto), the State executive officers were enjoined from funding one kind of State security into these very bonds, because to do so would violate the provisions of the Act of 1874, and would depreciate the value of the complainant's bonds. Was not that a matter of finance in the largest sense? Can you touch the financial discretion of a State in any manner more positive and direct than when you control the securities it shall issue and the terms upon which they shall be issued?

In *Davis vs. Gray* (16 Wallace) this Court stopped the execution by the executive officers of the land laws of the State. The chief property of the State consisted in its public lands. It adopted a scheme with respect to them. It invested its executive officers with large discretionary powers to dispose of them. This Court, however, held that as to lands before granted this scheme conflicted with the Constitution of the United States, and that, consequently, as to such lands, the State officers had no discretion, and enjoined their action.

Is not land quite as sacred as money? Is not a State's administration of its land laws quite as sacred as its administration of its financial laws?

So in *Osborne vs. The Bank* (9 Wheaton), the action enjoined the execution by the State of its tax laws—the collection by State officers of the State's revenue. Here the very gist of all State financial administration was enjoined; the structure was stopped at its base.

We submit then that from all the cases referred to, two conclusions must follow:

(1) That plaintiff's bonds are property, entitled to be protected from injury by the violation of any plain official duty not requiring the exercise of discretion.

(2) That the financial officers of the State had and have no discretion to divert the fund raised under the Law of 1874 from the payment of the interest on the bonds to which it was appropriated.

Tenth. There can at this day be no dispute, either here or in England, that either mandamus or injunction will go from any competent Court against any executive officer, no matter how high his station, to enforce the performance or prevent the violation of any ministerial duty.

The difficulty has been in drawing the line between discretion and no discretion. In *Marbury vs. Madison* (1 Cranch, 137), it was held that mandamus would go to compel the Secretary of State to deliver a commission, but that this Court had no original jurisdiction in the premises.

See opinion *Ch. J.*, Marshall, pp. 164-5;
1 Curtis' Decisions, 379.

In *Kendall agst. United States* (12 Peters, 608), mandamus was awarded—Chief Justice Taney and Judges Barbour and Catron dissenting, on the ground that jurisdiction to issue mandamus had not been vested in the Circuit Court for the District of Columbia, and *not* on the ground that the act commanded was not ministerial in character and properly the subject of the writ.

In *Decatur vs. Paulding* (14 Peters), the writ was denied on the ground that the act desired was discretionary and not ministerial in character – Judges McLean, Story and Baldwin dissenting, and holding the act ministerial in character, and Judge Baldwin holding on the merits against the relator.

In *Brashear vs. Mason* (6 Howard), the writ was denied on the ground that the act was discretionary in character.

In *United States vs. Guthrie* (17 Howard), it was denied. The opinion of four Judges, Taney, *Ch. J.*, Daniel, Wayne and Catron, held, the act claimed, to be discretionary in character, and on that ground affirmed. The opinion of Curtis, *J.*, with whom concurred Nelson, Grier and Campbell, *JJJ.*, held that the real question involved was the right of the relator to the office, and that mandamus was not the proper remedy; and on that *ground only* affirmed.

McLean, *J.*, dissented, and in an elaborate opinion held that the writ should go.

Thus, only a minority of the Court held that the Secretary was not liable to mandamus on account of the discretionary character of his duty.

In *State of Mississippi vs. Johnson* (4 Wallace, 475); *United States vs. Comp. of Land Office* (5 Wallace, 563); and *Gaines vs. Thompson* (7 Wallace, 347); *Secretary vs. McGarrahan* (9 Wallace, 298), and *Litchfield vs. The Register* (9 Wallace, 576), the same general doctrine was restated.

See also, Commonwealth of Kentucky vs. Dennison, Governor, &c., 24 Howard, 95, and Opinion of Taney, *Ch. J.*, as to the ministerial character of the act, p. 106.

A good definition of a ministerial duty is given by the Chief Justice in *State vs. Johnson* and cited in *Gaines vs. Thompson* p. 353: "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty

arising under circumstances admitted or proved to exist, and imposed by law."

Other courts furnish apt illustrations of the kind of duty which is regarded as ministerial, and which will be enforced by mandamus and injunction.

Graham, State Treas., vs. Horton (6 Kansas, 343) was a case closely analagous to the one at bar.

The Legislature authorized the issue of bonds and the levy of a tax, and proceeds to be used as a sinking fund.

Article Eleven of the Constitution provided: "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object only shall the tax be applied."

Subsequently the Legislature, by joint resolution, directed that the sinking fund which had been raised should be invested in warrants issued to pay legislative and judicial salaries.

A holder of a five-hundred dollar bond filed a bill to enjoin such diversion of the sinking fund, and the injunction was awarded.

The case was most fully argued by the counsel for the State Treasurer.

In *Galloway vs Jenkins, Treas., et. al.* (63 N. C., 147) the State Treasurer was enjoined from issuing State bonds authorized by an unconstitutional law on a bill filed by a taxpayer.

In *People vs. Allen* (1 Lansing 248-258), the Comptroller of the State of New York (a constitutional and elective offier) was compelled by mandamus to pay moneys appropriated by law. This case was reversed in the Court of Appeals, but on the ground that the law requiring the payment was unconstitutional (42 N. York, 378).

Indeed, that Court, in *People vs. Allen* (42 New York, 409) clearly expressed the opinion that mandamus against the Comptroller would lie to compel the loan of public moneys, pursuant to a law, provided the law was constitutional.

In *State vs. Chase, Governor* (5 Ohio, State

Rep., 529), where the mandamus was issued, Chief Justice Bartley said:

"Under our system of Government no officer is "placed above the restraining authority of the law, "which is truly said to be universal in its behests, "all paying it homage, the least as feeling its care, "and the greatest as not being exempt from its "power." In that case the Court required the Governor to issue his proclamation, pursuant to a law requiring him so to do, in a certain contingency, which was admitted to exist.

See also State ex rel. Railway Co. vs. Nichols, Gov. (30 La. Annual, 980) in which the writ of mandamus issued.

People vs. Sups. (51 New York, 407) and cases cited.

Supt. vs. U. S., (4 Wallace, 435).

Says Swayne *J.*, p. 447: "What they" (public officers) "are empowered to do for a third person, the law requires shall be done. The power is given not for their benefit, but for his" etc.

Several of the foregoing cited cases, especially those in this Court, refer to a certain power of construing laws vested in the public officer as a part of the discretion which the courts will not control.

In every case in which such reference or suggestion is made, it appears that large powers of construction were given to the officers. The land office laws are a pertinent illustration where substantially judicial functions are given to the officers.

But, however large the powers given to the officers, no case can be found holding that on a matter in which the law leaves him *no discretion*, writs of mandamus and injunction will not go against him; nor can any case, save and except that decided by the learned District Judge of Louisiana, be found holding that the writ will not go in a matter as to which he has no discretion, because there are other matters whereof he has discretion as to which it will not go.

It is also beyond question the law of this Court, that the power of construction of an executive State officer does not extend to the right to judge whether a subsequent State law changing his ministerial duty is repugnant to the Constitution of the United States.

Clearly no State law could vest in its officers any such discretion or any such jurisdiction called by any name.

The cases of *Osborn vs. The Bank*, *Davis vs. Gray*, and *Board vs. McComb*, seem decisive on that point.

The discretion claimed to be a defense must be in the execution of the law—a discretion under and pursuant to the law—not a discretion to disregard and overrule the law.

In the case at bar we submit that no words could more clearly and positively prohibit the diversion of this fund. No pretense is made that under the law there is anything left to discretion. The claim goes to the extreme length that in spite of the clear positive terms of the law, the officer has a discretion to disregard it.

Such a claim belongs to a government of satraps —it has no place in one of laws.

Eleventh. It may well be that the State officers, as such, are not the persons charged with the execution of this law.

The law constitutes them a board of liquidators (sec. 2), a quasi corporation. They have certain duties as such board.

The levy and appropriation of the tax are made by the law (sec. 7).

The purchase and retirement of bonds out of surplus income are to be made by *the board* and it is made "the duty of the Auditor and Treasurer, *and* " of *the said board*, respectively, to collect said tax " annually and pay said interest and redeem the " said bonds until the same shall be fully dis- " charged" (sec. 7).

This law substantially makes *the board* a trustee between the State and its creditors to collect and apply this tax. The sovereign acts of levy and appropriation are done by the law. Powers to carry it out are then vested in this board.

The Board stands in the same position as a municipal corporation, which, by virtue of law, has issued bonds with power to levy and collect a tax for their payment.

There is only this difference, that in the case at bar the levy is made in the act itself.

This brings the case within the principle of a familiar class of cases, where laws are made for certain purposes and certain Commissioners or corporations then named to carry them into effect.

Attorney-General vs. Brown, 1 Swanston's Ch. R., 265.
Attorney-General vs. Dublin, 1 Bligh's N. R., 312.
Attorney-General vs. Belfast, 4 Irish Ch., 142-143.
Attorney-General vs. Eastlake, 11 Hare, 205.

Under these acts the individuals or the corporations were appointed "Commissioners" or "trustees" to carry the acts into effect.

Eng. Stat. at Large, 13 Geo. 3d., Ch. 34.; 1st Chitty's Stat., 625; 4 do., 754.

In these and many similar cases, diversion of the funds was enjoined and restitution decreed at the suit of the Attorney-General, and our own decisions show that a bondholder, secured by the tax, has the same right.

Now, that the persons who are named in the Act to carry out its provisions are also some of them executive officers of the State, is surely irrelevant.

The duty is imposed as trustees under the act.

The State steps down from her high pedestal of sovereignty and makes this *contract*, and in and by

this contract appoints this board as trustees to carry out its provisions.

We submit that the State is bound, the officers are bound, and the bondholders, who have accepted the bonds on the faith thereof, have a right to invoke the aid of any court of equity to enjoin the trustees from a diversion of the fund.

Twelfth. None of the reasons which have been given for refusing injunction or mandamus apply to this case.

The serious consequences to the State treasury of being governed by the decisions of several and possibly conflicting courts suggested in *U. S. vs. Guthrie*, or of "throwing the pension" or other "fund, and the whole subject of pensions" or of bonds, "into confusion and disorder" suggested in *Decatur vs. Paulding* cannot occur.

All that is here asked is that the officers obey the positive statute law and keep the pension fund for pensioners, the salary fund for salaries, and the *bond fund for bonds*, because the law has said in the most positive terms that the bond fund shall not be diverted.

Within the terms of the law that the fund shall be applied to bonds, and to bonds only, we do not propose to interfere with the judgment or discretion confided to the officers, always providing that they are exercised in good faith.

On the other hand, the consequences of a refusal to interfere in a case like this would be disastrous in the extreme.

Uncontrolled and absolute power would be intrusted to executive officers.

Control of the Legislature over the treasury would be practically gone.

The advantages of personal watchfulness over public interest over those having special interests would be lost.

Faith and confidence in the power and universality of the law would be weakened and the public faith

itself become a shuffle ball to be kicked about by every cabal of executive officers.

To enjoin this contemplated act would leave every possible benefit of discretion and prevent only the most palpable abuse of arbitrary power.

Thirteenth. Entertaining jurisdiction in this case is in harmony with the spirit and purpose of the Constitution.

Whatever philosophers or theorists may have evolved in the way of plans for the improvement of social humanity by eliminating war or other equivalent methods of settling controversies, the Constitution of the United States, beyond question, took the first practical step in this direction.

By means of it independent sovereignties are brought into such relations that military conflicts between them cannot be resorted to for settlement of their difficulties; and to this tribunal, in the language of Chief Justice Taney, is referred the settlement of controversies that in other countries are decided only by the arbitrament of the sword. In the history of this Court it has passed upon and decided very many such controversies. The exercise by a Court of such jurisdiction is altogether unique. Nothing could more accord with the spirit of the Constitution, and with the spirit of the jurisdiction that has been constantly exercised by this Court, than the entertaining and decision of controversies between States, which otherwise would be either insolvable or relegated to that arbiter which it has been the aim of civilization to suppress. It may indeed have been well that the original jurisdiction to entertain the complaint of any individual against the sovereignty of a State should be repealed. The difficulties attending such jurisdiction are more apparent now with a country occupying almost a continent, and a population exceeded by few nations, than at the time when the Constitution was formed by the original thirteen States,

and when the population numbered but a few millions. There, however, can be little apprehension that States will be willing to, or will, assume the prosecution of claims of its citizens, as has been done in this case, unless the subject matter of discussion is of dignity proportioned to the dignity of the parties to the litigation and of the high tribunal to which they resort. And there can be no more impressive spectacle than that of the large and important political bodies which compose and sustain this union, bringing for settlement to this tribunal the controversies in which they may be engaged.

Fourteenth. We submit that the Court has jurisdiction, and that the complainant is entitled to the relief demanded in the bill of complaint, and that the individual defendants should be enjoined from diverting the money raised for the payment of the coupon due January 1st, 1880, to any other purpose, and that they should further be enjoined from in any way obstructing the enforcement of and from failing to carry out all and singular the provisions of Act No 3 of the Legislature of the State of Louisiana for 1874.

MASON W. TAPPAN,
Attorney-General of the State of New Hampshire.
WHEELER H. PECKHAM,
Of Counsel.

Appendix.

CIRCUIT COURT OF UNITED STATES,

DISTRICT OF LOUISIANA.

JOHN ELLIOTT and others

vs.

FRANCIS T. NICHOLLS, Governor, and others.

WHEELER H. PECKHAM, ESQ, and MESSRS. LACY & BUTLER, ESQS., solicitors for complainants.

HON. H. N. OGDEN, Attorney-General, and HON. J. C. EGAN, Assistant Attorney-General, solicitors for respondents.

E. C. BILLINGS, *Judge:*

This cause is submitted upon the bill of complaint. An application is made for an injunction *pendente lite.*

The bill is brought by numerous citizens of the State of New York against Francis T. Nicholls, Governor, Allen Jumel, Auditor; and Edward A. Burke, Treasurer of the State of Louisiana, all of whom are citizens of said State of Louisiana.

The bill sets forth that the complainants are the holders of bonds with the annexed coupons issued by the State of Louisiana under what is known as the "Funding Act," being Act No. 3 of the Legislature of Louisiana for the year 1874.

The bill charges that by the terms of that act a continual annual tax of 5½ mills on the dollar of all the property in the State was levied, and by a continual annual appropriation set apart for the purpose of paying the interest and principal of these bonds, the excess, above what was necessary to pay the interest, being by said act devoted to the retire-

ment of the principal or the bonds themselves; that this act was, by a provision of the Constitution of the State of Louisiana, which was adopted at the general election in November of that year, confirmed and declared to create a valid contract between the State and any and all of the holders of said bonds, and that no further legislation should be requisite for the assessment and collection of the tax, or the payment of the interest and the principal when collected; that there is the snm of $350,000 in the hands of the State Treasurer, which has been collected and paid into the State Treasury for the payment of the interest and principal of said bonds, and under the Funding Act of 1874, and according to said constitutional amendment, and that the sum of $133,000 has been so collected and paid into the State Treasury to meet the interest upon said bonds falling due on the first day of January, 1880.

That the Constitutional Convention of the State of Louisiana, which was assembled in the year 1879, has proposed, and the people of the State have adopted, a new Constitution, which is to go into operation on the first day of January, 1880, which provides that the interest taxes collected to meet the coupons payable at that time shall be transferred to defray the expenses of the State Government, and that its provisions also limit the entire State tax for any one year to six mills on the dollar of all the taxable property within the State; that these provisions of the new Constitution impair the obligation of the contract made between the State and the holders of said bonds, but that, as complainants fear, they will have full effect given them by the defendants; that complainants' contract will thereby be defeated, and the said sum of $235,000 now in the treasury of the State will be diverted from the payment of the interest upon said bonds to the purpose of defraying the expenses of the Government of the State.

The prayer of the bill is that the new Constitu-

tion, so far as conflicts with the contract embodied in said act No. 3 of the Legislature of the year 1874, and with the amendatory provision of the Constitution adopted in the same year, may be declared to be void; that the defendants may be compelled by the decree of this Court to carry into effect the provisions of the said act No. 3 of the year 1874, and that the defendants may be enjoined from making any other disposition of the moneys in the treasury of the State collected under the last-mentioned act, than that of the application of the same to the payment of the interest and principal of said bonds.

This is a bill in equity brought against the Governor of a State, its Auditor and Treasurer, to compel a specific performance of a contract made between the State and its creditors—*i. e.*, to compel the payment of certain bonds and interest coupons issued by the State, and for a series of years to collect and pay over the taxes heretofore levied for that purpose. Incidentally, and in aid of the bill, an injunction is asked to prevent the diversion of moneys arising from taxes and now in the State Treasury from being applied for any other purpose or in any other manner than to the extinguishment of these bonds and interest coupons, in accordance with designation and promise of the State made by a legislative act and confirmed by a constitutional provision.

The Governor of the State is made a party defendant. The bill must be brought against him either as the Chief Magistrate of the State or as a member of the Board of Liquidators, which board, after completing the funding of the debt of the State, is charged by act No. 3 with the duty of devoting any surplus of the annual taxes which may remain after paying the annual interest, to the buying up or redeeming the bonds themselves. Neither by that act nor by the confirmatory provision of the Constitution did that officer have any other function committed to him with reference to the disposition of the yearly taxes. The clear meaning is,

that the Auditor and Treasurer shall pay the interest, and the board is to redeem the bonds only with any excess of funds beyond the amount required for the payment of the interest. There can be no ground whatever for an injunction against the Governor, as, with reference to the disposition of the moneys raised, he can only act as one of the board, and with an excess which it is not claimed has any existence.

The restraint, therefore, can be sought only upon the action of the Auditor and Treasurer, who alone are charged with paying the interest upon the bonds, and the money being in the treasury, they alone could divert it.

I have not been able to see how the right to the injunction can be separated from the right to the ultimate relief sought by the bill, to which it is nothing but an adjunct and conservatory means. It is not averred that any suit at law is anywhere pending, or is to be instituted, in aid of which this suit is brought. This Court is asked to detain by injunction the moneys in the treasury, without any suggestion of any compulsory process by which it can be applied to the satisfaction of the complainant's claims, unless the final decree in this cause can afford such process. So far as the money in the treasury is concerned, the title to the injunction, as well as that to the final relief, must rest upon the question as to whether the authority resides in courts of justice to deal with moneys so situated.

Before considering this question it will be necessary to ascertain the character of the offices of the Auditor and Treasurer of the State, and the functions of those officers assigned to them respectively, under the Constitution and Laws of Louisiana.

They are each declared by the Constitution of the State to be members of the Executive Department. They are chosen by the people, hold their offices for the period of four years, and are liable to impeachment.

Their powers and duties are still further defined

by legislative enactments which were in force when the Constitution of 1868 was adopted, and which have not been abrogated. Those of the Auditor are as follows: To adjust and settle all claims against the State payable out of the treasury, except such claims as may be expressly required by law to be audited by some other person. He may, in his discretion, examine under oath parties presenting claims, and other persons as to the facts of the claims. In all cases of allowed claims he must draw his warrant upon the Treasurer in a prescribed form. At the request of any person interested who is aggrieved by his decision, he must refer any account, claim or credit presented to him to be audited to the next General Assembly. *He is required to cancel any interest coupon upon his giving a warrant in settlement of the same.*

The appointed duties of the Treasurer are to receive and safely keep all the moneys of the State; to disburse them upon warrants drawn upon him according to law, and not otherwise. He is declared guilty of a misdemeanor if he has funds in his hands for the payment of any warrant, and he shall refuse to pay the same. No money can be drawn out of the treasury but in pursuance of specific appropriations.

There can be no question but that the Auditor and Treasurer of the State of Louisiana are executive officers, charged with the exclusive fiscal administration of the State, and having their respective duties clearly defined by its Constitution and permanent laws.

It is equally clear that the acts in respect to which they are sought to be controlled by this Court in this bill and by this injunction are included in the ordinary duties of their offices.

The case of *McCauley vs. Kellogg*, reported in 2 Woods, p. 13, is, in its leading features, the exact counterpart of this case. That suit was brought immediately after the passage of Act No. 3 of the session of 1874, to prevent its enforcement, by the

holders of obligations of the State previously issued, under statutes which provided that a specified annual tax should be laid and collected until the obligations, principal and interest, should be discharged. True, the complainants there invoked no provision of the Constitution, as do the complainants here, framed for the sole purpose of giving inviolability to the contract under which they held their bonds. But they urged the general provision of the Constitution (Art. 111), which declared all laws by which the Legislature, at the time it created obligations, provided the ways and means for their payment, should, until the obligations were fully paid, be irrepealable. That bill, like this, was brought against the Governor, Auditor and Treasurer of the State, and sought, as does this, to compel those officers to execute a contract of the State, and to restrain them from executing the laws which impaired that contract. In that case, as in this, there were moneys in the treasury, collected under the laws for the payment of the obligations which the complainants held. The bill asked and the application was, among other things, to restrain the defendants from "paying or causing to be paid out any interest funds now in the treasury, or hereafter to come in, for any purpose save to pay the interest and principal of complainants' bonds."

The Circuit Judge, after analyzing the decisions, showing the want of authority vested in the Circuit Courts to grant a mandatory injunction, and after a luminous exposition of the cases touching the construction of the Eleventh Amendment to the Constitution of the United States, thus concludes: "In the view I have taken of the case, I have conceded what complainants claim, that the funding bill and the act of March 14, 1874, are both unconstitutional and void, and have regarded the bill just as if those acts had never been passed, to wit: A bill to compel the defendants, officers of the State, to execute its laws. This may be done in the case of the officers of a municipal corporation, but

the sovereign power of a State cannot be so coerced. To do so would be to substitute this Court for the executive officers of the State, to supplant their views of duty and the obligations imposed upon them by their official oath, by the discretion of this Court and its official oath. In other words, it would be an undertaking on the part of this Court to administer the State Government. This the Court has no power nor inclination to do."

In my judgment this is to all intents and purposes a suit against a State. The officers of the State, including the Chief Executive, are sued in their official capacity to compel them to execute the laws of the State. It is a suit to enforce a contract of the State to pay money. The officers are not sued as individuals who happen to be in public office to prevent them from doing some act to the prejudice of complainant not warranted by law, as was the case in *Osborn vs. The Bank*, and *Davis vs. Gray*, If a suit like this can be sustained, then the eleventh amendment to the Constitution of the United States is waste paper."

That case is indistinguishable from this, unless as is averred in the bill, and has been urged in the argument, the State has submitted itself to be sued by virtue of the constitutional amendment of 1874.

The language there used is: "To secure such levy, collection and payment the judicial power shall be exercised when necessary." It need not be here discussed whether the Circuit Courts of the United States can take jurisdiction of a suit against a State brought by citizens of another State, by virtue of the State's consent, notwithstanding the prohibition of the Eleventh Amendment of the Federal Constitution. For the amendatory provision of the Constitution of Louisiana gives no such permission. The debt of a State had been funded. The so-called consolidated bonds had been issued. The sole source for their payment was an annual tax, which the Legislature, by the exercise of a doubtful prerogative, had levied well nigh in perpetuity. To remove

the doubt the amendment was adopted. It was manifestly directed exclusively to the confirmation of this continual annual tax, the prevention of the possibility of its repeal or being declared invalid, and, through the clause immediately in question, it was intended to preserve to the creditor during the long series of years for which the tax was levied, and beyond the power of withdrawal on the part of the Legislature or the State the right to employ the process of the courts in aid of its levy, collection and payment. There was no enlargement of the judicial power. As it then existed, and as it then attached to this statutory contract, which levied an annual tax for probably a generation, so it was to be continued without substraction. This was the object and meaning of the amendment. For this purpose the words employed are adequate, but they are inadequate to convey a permission to bring before the courts a sovereign State, or to authorize the courts by a bill in equity to administer, for an unlimited term of years, the finances of a State. It is not to be supposed that such a permission, carrying with it responsibilities and consequences of such incalculable magnitude, would be attempted to be communicated by words which are far more reasonably construed otherwise.

In the case of *McComb vs. The Board*, where one of the questions was as to the jurisdiction of the Court over the Board of Liquidators, created by the Funding Act of 1874, in the matter of giving out those consolidated bonds to the prejudice of the rights of those who were by the act authorized to receive, and who had accepted them according to its terms, the Supreme Court do not even refer to this clause. They thus summarize the constitutional provision: "The amendment," they say, "provided that the issue of consolidated bonds, authorized by the Funding Act, should create a valid contract between the State and each holder thereof, which the State should not impair; prohibited the issue of any injunction against the payment of the bonds or levy

of the tax; and directed that the latter should be levied and collected without any further legislation." They proceed to decide the question of jurisdiction affirmatively without attempting to find any grant of authority in this passage.

The question then remains, does the judicial power under the Constitution of the United States, and that of the State of Louisiana, or, indeed, under any government where its powers are defined and apportioned among separate departments, include this case? After the fullest examination of the subject, I have come to the conclusion that it does not. An injunction is asked for from the Circuit Court of the United States, which is to control the Auditor and Treasurer of the State of Louisiana in the discharge of their ordinary duties as the Auditor of Accounts and the Treasurer of a State, which duties are expressly assigned to them by virtue of the Constitution and laws.

The reason why courts cannot exercise this control over a treasury of a government are stated in the opinions of the courts and in the arguments of counsel in the cases to which I am about to refer. These reasons are as follows:

1. That the regard for public interests requires that the action of governments upon claims preferred against their treasuries should be prompt, and, therefore, should be conducted by the Executive Department, whereby the public creditors will be saved from the complications and delays consequent upon litigation in the courts.

2. That courts cannot understand the public necessities nor the situation of the treasury with reference to its capacity to answer demands made upon it.

3. That to subject the treasury of a government to the control of its courts would be to substitute the discretion of numerous tribunals which might not act in harmony, thereby producing confusion and public disaster, in place of the discretion of a single department, which can act with consistency

and under uniform rules, and whose action is subject to a speedy review by the Legislature.

4. That unless the Treasury Department is guided in its action by its own discretion, it cannot give certain information to the Legislature with reference to the public supplies; and

5. That the constitution and laws of all governments are framed upon the theory that the treasury of a State has its distinct and independent responsibility.

The cases decided by the Supreme Court of the United States invariably recognize the principle that, when an officer of the treasury of the State is by law vested *with discretion*, he cannot in its exercise be controlled by the courts, but they do not afford a fixed and settled guide whereby to determine what acts of the fiscal officers are discretionary.

I propose, therefore, to consider what principle has been established by the Supreme Court of the United States as to the amenability of the officers of the treasury to the courts.

The leading case on this subject is that of *Decatur vs. Paulding* (14 Peters, 497). The plaintiff, Mrs. Decatur, by a resolution of Congress, had been granted a pension. The Secretary of the Navy had been constituted trustee of the navy pension fund, and it was made his duty, as such trustee, to grant and pay the pensions according to the acts of Congress. He declined to pay the pension on the ground that the plaintiff had received already a pension under the general law, passed on the same day with the resolution, and that it was not the intention of Congress that she should receive under both. Mandamus had been brought in the Circuit Court of the District to compel the Secretary to pay. It was admitted that the pension fund was ample to pay the plaintiff, as well as to satisfy all other demands upon it. The Supreme Court declared that the Circuit Court had no jurisdiction over the acts of the Secretary in this respect, on the ground that "the duty required by the resolution was to be per-

formed by him as the head of one of the executive departments of the Government in the ordinary discharge of his official duties." The Chief Justice, in giving the opinion of the Court, says further: "The interposition of the courts might throw the pension fund and the whole subject of pensions into the greatest confusion and disorder." Justice Catron, giving a concurring opinion, says: "I maintain that the executive power of the nation, headed by the President and divided into departments, in its administration of the finances of the country, acts independently of the courts of justice in paying the public creditors." * * * "And that the petitioner could only appeal to Congress." * * * "The decision of the treasury officers must be final in most instances in the nature of things and the necessities of the Government. Money is appropriated for certain objects; none can be drawn from the treasury save according to law; of the obligations, the department must judge in a prompt manner; they cannot await years of litigation to learn their duties and the responsibilities of the Government from the courts; the Secretary of the Navy could not subject to want and misery the whole of the widows and orphans on the navy pension list until he was informed by the Court of this District whether Mrs. Decatur should be paid her claim." * * * "To permit an interference of the courts of justice with the accounts and affairs of the treasury would soon sap its very foundations. Money would not be drawn out according to its own rules, nor could the Secretary of the Treasury ever inform Congress of the amount needed."

The next case is that of *Brashear vs. Mason* (6 How., 92). This was a review upon an application for a mandamus to compel the Secretary of the Navy to pay the relator his arrearages of pay as a naval officer. The Court decided adversely to the jurisdiction, and by a unanimous opinion reaffirmed the doctrine laid down in the case of *Decatur vs.*

Paulding. See *The United States vs. Guthrie* (17 How., 284). This was a case in which the relator, Aaron Goodrich, claimed that, having been nominated and confirmed as Chief Justice of the Territory of Minnesota for the period of four years, he was entitled to the salary for the entire term, although the President had attempted to remove him. He applied to the Circuit Court for the District of Columbia for a mandamus upon the Secretary of the Treasury to compel him to pay to the relator his salary, which was refused, and on a writ of error the judgment was affirmed in the Supreme Court, though the justices divided their reasons, a portion holding that the question as to the title to an office could not be presented by a mandamus to pay the salary. The justices who passed upon the question involved here were five, four of whom held that the Circuit Court had no jurisdiction. Justice Daniels, in pronouncing the opinion of the Court, says: "For it would occur *a priori* to every mind that a treasury not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The Government, under such a régimé, or under such an absence of rule, would, if practicable at all, be administered, not by the great departments ordained by the Constitution and laws and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts in the enforcement of private interests." He adds, the only instances in which the department could be controlled are with reference to "acts or proceedings by the officer not implied in the several and inherent functions or duties incident to his office—acts of a character rather extraneous and required of the individual rather than the functionary."

Now, if we apply the doctrine here settled, how clear it is that this Court is without jurisdiction. The acts or proceedings which are here sought to be controlled are those which are implied in the inherent duties and functions incident to the offices of the defendants. Indeed, they are their ordinary duties. The Auditor is sought to be controlled in the matter of the drawing of his warrants in the settlement of claims against the public treasury, and the Treasurer is sought to be controlled in the matter of paying the public money out of the treasury of the State. Nothing is required of the individual. The things to be done are required entirely of the functionary, and not at all of the individual. So much is it a matter of the ordinary duties of these officers to pay the interest coupons, that by a general law of the State the manner in which these officers shall cancel the coupons is established.

Nor are the English authorities less emphatic and conclusive. The case of *The Bankers*, reported in 14 Howell's State Trials, p. 1, furnished the occasion for the delivery of Lord Sommers' opinion, which is so conspicuous for its clear definition of judicial power in matters pertaining to the King's Treasury, that, after the lapse of nearly two centuries, it is still cited with veneration in the courts of Great Britain. He states the case thus: "The question, then, is, if an annual sum be granted by the King under the great seal, out of any branch of the revenue, to a subject and his heirs, and the annual payment happen to be in arrear, whether by law the party may come to the Barons of the Exchequer immediately, and they, upon prayer to them, may enroll and allow the letters patent, and may, thereupon, order the Treasurer and Chamberlain to pay out of the exchequer the arrears, and also the growing payments of the future."

Lord Sommers held that the parties could not come in the first instance before the Barons of the Exchequer, but that they must present their case by petition to the King. He says: "I will add one consideration more, which is from the incon-

venience; no inconsiderable argument in law, which is, that if the King's treasure be so far subject to the administration of an ordinary court of justice as that it must be regularly issued upon the application of the subject who has a demand thereon for an annuity or any other debt (for I do not see but the reason is the same), this may turn to the weakening of the public safety to a very high degree." * * *

"The truth is, this method does in effect set aside the Lord Treasurer, one of the greatest officers of the kingdom."

In the Court of Queen's Bench, as late as the year 1872, in the case of *The Queen vs. The Lords Commissioners of the Treasury* (7 Law Reports, p. 387) the same doctrine is maintained, and the cases, which had seemed to hold the contrary, were doubted. In this last case an amount had been appropriated by Parliament to defray the charges for prosecution in certain courts, and had been paid into the hands of defendants as Lords Commissioners of the Treasury. Charges for the prosecution, for the payment of which provision was made by the appropriation, had been incurred. A *mandamus* was sought to compel the treasurers to pay these charges. It was held that there was no doubt but that the charges were provided for by the appropriation and ought to be paid by the treasurers, but that the writ would not lie, as the treasurers were amenable to the Crown alone. Chief Justice Cockburn, in the course of his opinion, says: "Over the sovereign we can have no power. In like manner, when the parties are acting as the servants of the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."* * * * "When the money is paid, I can entertain no doubt that it is paid to the Lords of the Treasury as servants of the Crown; and though I quite agree that, according to the appropriation act, they were bound to apply the money upon the vouchers being produced, and had no authority to retax these bills, still I cannot say that there is any

duty which makes it incumbent upon them to do what, I cannot hesitate to say, they ought to have done except as servants of the Crown, because in that character they have received this money, and in no other. Although the Lords of the Treasury have made a very great mistake, and although the present state of things is of the most anomalous and most unsatisfactory character, I regret to say, according to the true principle upon which this prerogative jurisdiction ever has been and ought to be exercised, I do not see that this Court has authority to issue this writ of *mandamus*."

I think it clear, upon reason and authority, that where constitutional officers of a government are acting within the sphere of their ordinary duties in matters involving discretion or judgment pertaining to the disbursing of the public moneys, they cannot be controlled by the courts of justice. To do this would be to subvert the distribution of the great powers of government upon the maintenance of which alone its successful operation depends. The duty of observing this limit of jurisdiction is as imperative upon the Federal courts in case of the treasury of one of the States of the Union as it is in case of the treasury of the Union itself. It is equally clear that the matter involved in this bill and sought to be reached by this injunction, viz.: That on the part of the Auditor of determining as to the genuineness of the interest coupons, and that on the part of the treasurer of determining as to the situation of the treasury, with reference to the payment of the money upon the same, and that on the part of both these officers of construing the Constitution and the laws with reference to the payments of these demands out of the moneys of the State, are matters confided by law to their judgment as the officers of the treasury of a State, which the courts are not competent to govern.

The views of the Court in *The United States vs. Guthrie* are decisive of this case. The counsel who conducted the argument in favor of the power to issue the mandamus had urged that there could not

be an act more absolutely ministerial than that of the Secretary in making the payment; that the salary was fixed by law, the time and place of payment were appointed by law, and the money was waiting in the treasury appropriated for that payment. But the Court answered that the act of making payment of the money by the Secretary was a duty which was implied in the inherent functions of his office; that it was not in the power of the Court to command the withdrawal of money from the treasury to pay disputed or controverted claims; that the right of decision or judgment, therefore, existed in the Secretary, and not in the Court.

In the case of *Osborn vs. The Bank* (9 Wheaton), the Court issued an injunction to protect a bank and its vaults from trespass; in the case of *Davis vs. Gray* the writ was granted to protect the owner of a tract of land from having his title clouded by wrongful location of warrants upon it; in *McComb vs. The Board* the Court, at the instance of the holders of certain bonds, restrained the members of a Board of Liquidators from injuriously affecting their value, in violation of the contract under which they had been accepted, by issuing similar bonds to parties not entitled thereto; and in the case of *The Louisiana State Lottery Company vs. Fitzpatrick*, at the last term, this Court issued an injunction to protect from destruction the franchise of a corporation and their rights of property vested under a legislative grant. It is true that in all these cases the parties restrained were officers of a State, acting under a law of a State, which impaired the obligation of a contract, and was, therefore, unconstitutional and void. But in all these cases the thing which was sought to be protected was by law subject to the control of the courts. The principle controlling all these cases was that courts will enjoin or command those who are acting under a void law as if there was no such law. The limitation which this case gives rise to is not to the principle, but to the authority of courts to apply it. The insuperable obstacle lies in the exclusive control which, by the Constitution and laws of the State of Louisiana,

is vested in its Auditor and Treasurer over the fiscal administration of the State, and the incompetency of courts of justice to exercise jurisdiction over it.

The Court has not attempted to determine any question pertaining to the morality or the statesmanship involved in the matters presented by this bill of complaint. I simply find that the judicial authority does not embrace this cause.

Let the application for the injunction be denied.

CIVIL DISTRICT COURT.

STATE *ex rel.* SAMUEL J. HART

vs.

E. A. BURKE, State Treasurer.

No. 1,430—Before Judge Monroe.

Reasons for Judgment.

The petition presents substantially the following case:

Plaintiff holds and owns $75,000 of coupons for interest due January 1, 1880, upon State bonds issued pursuant to the provisions of Act No. 3 of 1874, known as the "Funding Act."

The act provides in terms that each of its provisions shall and do constitute a contract between the State of Louisiana and those who become the holders of the bonds issued in accordance with said provisions; it further provides for an annual and continuous levy, collection and appropriation of a tax of 5½ mills, and especially sets the same apart exclusively for the payment of the principal and interest of said bonds and for their redemption, and makes it the duty of the State Auditor and Treasurer and the Board of Liquidation, created by said act, respectively to levy, collect and disburse said tax accordingly. This duty was discharged up to July 1, 1879, inclusive, at which date the semi-annual interest was paid in part or in full.

Since that time several hundred thousand dollars of said tax, based upon the levy and assessment of

1879, have been collected and are now in the treasury of the State, applicable, under the terms of the act by virtue of which it was collected, to the payment of the past due interest upon said bonds.

The Treasurer, however, refuses to apply it in this way, claiming that by an ordinance of the State Constitutional Convention, ratified as part of the Constitution of 1879, the interest which fell due January 1, 1880, "was remitted," and the money collected "transferred" to defray the general expenses of the State

It is claimed, upon the other hand, that the ordinance in question is void, because in violation of Art. 110 of the State Constitution of 1868, and of Art. 1, sec. 10, of the Constitution of the United States. Plaintiff charges that the Treasurer is about to divert the money in question, now in his hands; alleges that he will suffer irreparable injury thereby, and prays for a writ of injunction to restrain such diversion.

The Treasurer, for answer why the injunction should not issue, avers substantially:

1. That his office is a branch of the Executive Department of the State, and as such is independent of and beyond the control of the judiciary.

2. That this Court has no jurisdiction in the premises, for the reason that the real party in interest is the State of Louisiana, and the real question to be tried is a question of debt as against the State, and that the State is not and cannot be made a party defendant in the suit.

3. That there being no defendant, there can be no suit, and the writ of injunction, which only issues as auxiliary to a principal demand, cannot issue.

4. That no bond can be given in favor of the defendant, as required by law, as there is no real defendant; and that no injunction can issue without bond.

5. That the Constitution of 1879 transfers the money in question, and the judiciary has no power to prevent his obeying its mandates agreeably to his oath of office.

6. An amended return was filed, in which the Treasurer denies the validity of any coupons held by plaintiff, and alleges that the act under which the bonds referred to were issued contravenes the Constitution of the United States.

An intervention was filed on behalf of Isidore Newman, not necessary to be noticed at this time.

The statements in the petition were verified by the affidavit of the plaintiff; no other affidavits were presented. As to the facts, therefore, the Court will consider the case as made by the petition, from which it results that for the purposes of this rule plaintiff is to be considered as the holder and owner of coupons for interest upon State bonds issued pursuant to Act No. 3 of 1874; that said coupons matured January 1, 1880, and are unpaid, notwithstanding demand has been made upon the treasurer for payment; that the Treasurer has in his hands a sum of money realized from the tax imposed under said Act No. 3 of 1874, which he is about to transfer and use to defray the expenses of the State.

It is true that in his amended return the defendant, the Treasurer, denies the validity of any coupons which the plaintiff may hold, and avers that the law under which the bonds referred to were issued contravenes the Constitution of the United States; but it is not stated in what respect the coupons are invalid, or in what respect Act No. 3 of 1874 is unconstitutional, nor was any argument addressed to the Court upon this subject.

Under these circumstances, and in view of the provisions of the Act of the Legislature of 1874, of the amendment to the Constitution of 1868, declaring that act a contract, and of the very ordinance in the Constitution of 1879, recognizing the bonds issued under the Act of 1874, and providing a new funding scheme in which they are to participate, upon which the defendant bases his action, the Court feels obliged to consider that the matter set up in the amended return is not intended as a serious defense.

The propositions that the Act of 1874 constitutes a contract between the State and the holders of the bonds (or coupons of bonds), issued pursuant to that act, and that the ordinance adopted as part of the Constitution of 1879 impairs the obligations of that contract, appear elementary, and their ownership need not be demonstrated.

The ordinance contains the following language:

"That the coupons of the consolidated bonds falling due the first of January, 1880, be, and the same are hereby, remitted, and any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the State Government."

The ordinance is certainly familiar in its phraseology.

The word "remitted" is defined by Webster to mean "relaxed," "forgiven," "pardoned," "sent back," "given up," "transmitted in payment," and it is not easy to understand how the Constitutional Convention could remit the coupons then in the hands of the creditors of the State. The creditor may remit his debt, since by so doing he "forgives it," "pardons it" or "gives it up," or the debtor may remit money to pay the debt which he owes, since he thus sends it back or transmits it in payment; but the debtor cannot remit the debt which he owes, whether with or without the consent of his creditor.

The succeeding paragraph relates to the interest tax collected to meet the coupons, and provides that it be "transferred" *to defray the expenses of the State Government.* This is certainly vague and indefinite treatment of so important a subject, and upon critical analysis it might be found that the whole clause quoted, taken together, presents difficulties of syntax and philology of no trifling character.

Assuming, however, that it means all that is attributed to it by respondent, we reach the conclusion already stated, that its effect, if any effect it can have, is seriously to impair the obligations of the contract between the State and the bondholders.

It cannot be denied that, to effect this, is to inflict an injury upon the plaintiff, and to violate the Constitution of the United States. If the material injury with which the plaintiff is thus threatened is at all proportioned to the threatened infraction of his rights, it is indeed great. The highest guarantee that could be given by the whole people of the United States, and of the different States, was given him that his contract should remain inviolate. This guarantee, given to all citizens who chose to make contracts, forms part of the foundation of the Government voluntarily laid by the States at its inception. If in the time of need it proves worthless, it is not only an injury of the gravest character to the party in interest, but it would seem to imply a most serious defect in a system which has commanded the admiration of the world. The question then is, does not the superstructure of laws built upon the Constitution of the United States afford the means of averting, or a remedy for wrongs threatened or done in violation of that Constitution?

The respondent denies that the plaintiff has any remedy, or, to speak more accurately, avers that he is not entitled to and that the Court is powerless to afford him the relief here sought, which is in effect the same thing. The wrong of which the plaintiff complains is that a specific fund, lodged in a certain place, pursuant to contract, for his exclusive benefit, is about to be removed and disposed of without his consent: and he seeks to prevent such removal. It is manifest that, under the circumstances of the case, unless he can succeed the injury will be irreparable.

It is said, however, that he cannot succeed, because the person who has the custody of this money, and who is about to dispose of it, is himself beyond the reach of the courts and of the laws of the country, by reason of the fact that he is an executive officer of the State; and that, moreover, in this matter, he is acting as the agent of the State, which cannot be brought into Court, but without which the proceeding cannot be conducted, since it, the State, is the real and only party in interest.

The theory that the officers of the State Government connected with or forming parts of the Executive Department are not amenable to the laws, and are, in all that relates to their official conduct, beyond the control of the judiciary is not, in my opinion, well sustained by reason or authority.

It must be conceded, as a general proposition inherent to all governments based upon the principles of justice, that where there is a right there is a remedy, not that remedies are or can be provided as against all moral wrongs; but where a community is organized upon a basis of law the system must be lamentably defective which does not find within itself remedies for offenses against it.

In the case of *Marbury vs. Madison* (——— 49), Chief Justice Marshall said, in considering this subject: '"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his Court."

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by the mere operation of laws. "In all other cases," he says, "it is a general and indisputable rule that where there is a legal right there is a legal remedy by suit or action at law whenever that right is menaced."

And afterward, at page 109 of the same volume, he says: "I am next to consider such injuries as are cognizable by the courts of common law, and herein I shall, for the present only, remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals, are for that very reason within the cognizance of the common law courts of justice, for it is a settled principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."

"The Government of the United States," says Judge Marshall, "has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right.

* * * * * * * * *

"It follows then that the question, whether the legality of an act of a kind of a department be examinable in a court of justice or not, must always depend upon the nature of that act.

"If some acts be examinable and others not, there must be some rule of law to guide the Court in the exercise of its jurisdiction. In some instances there may be difficulty in applying the rule to particular cases, but there cannot, it believed, be much difficulty in laying down the rule."

And, after some further consideration, the rule was laid down as follows:

"The conclusion from this reasoning is that, where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But when a specific duty is assigned by law, and individual right depends upon the performance of that duty, it seems equally then that the individual who considers himself injured has a right to resort to the laws of this country for a remedy."

This doctrine has been substantially affirmed in many cases since that time, and although instances are not lacking in which its force and value have been frittered away and its legitimate consequences denied, the Court has yet to learn that it has ever been overruled or repudiated.

In a comparatively late case, decided by the Supreme Court of the United States, *Board of Liquidation vs. McComb* (2 Otto, 541), which arose out of the identical act of the Legislature now under consideration, it was distinctly held that the writs of

mandamus and injunction will lie against State officers where the question involved is one of ministerial duty; and a fortnight has not yet elapsed since a long line of decisions in the Supreme Court of this State, based upon the same principle, was augmented by the decision in the case of *State ex rel. Collins vs. The State Treasurer*, in which a mandamus was made peremptory against the present defendant, and in his official capacity condemning the disposition of a particular fund in the State treasury.

The case of *State ex rel. McCauley vs. Kellogg* (2 Woods), to which I have been referred, will be considered hereafter; it suffices for the present to say that it in no manner militates against the views expressed by Judge Marshall.

It is that in a majority of States, where the question has been passed on, it has been held that the chief executive officer of the State could not be subjected to judicial control, and, in fact, it was so held in one instance in this State (22 Ann., p. 1).

Upon the other hand, in a very respectable minority of the States the contrary doctrine prevails. Mr. High (x. Leg. Rem.) says, § 119: The courts of last resort in Ohio, *Alabama*, *California*, *Maryland* and *North Carolina*, while conceding the complete independence of the Governor of the State from judicial control in the performance of this purely executive or political function, have held that, as to ministerial duties incumbent by law on the Executive, and which might with equal propriety have been required at the hands of any other officer, the general principle prevails, and mandamus will lie to compel the performance of such duties. § 120: While it may be conceded that the doctrine of the cases referred to in the preceding section, allowing mandamus to the chief executive officer of the State, as to the performance of purely ministerial duties, has much to commend it in the very strong reasoning adduced by the different courts in its favor, yet the weight of authority is clearly opposed to the doctrine, and the courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota and Rhode Island have estab-

lished the doctrine that the chief executive of the State is, as to the performance of any and all official duties, entirely removed from the control of the courts.

In the case of *The State of Mississippi vs. Johnson*, brought to restrain the President of the United States from enforcing the reconstruction acts, it was held that an injunction would not lie, for the reason that the case presented was one in which the acts sought to be enjoined were political or executive in their character, and required the exercise of discretion on the part of the President, which the Courts could not control. In deciding the case, however, the Chief-Justice said (4 Wall., 498): "We shall limit our inquiry to the question presented by the objection without expressing any opinion on the broader issues discussed in argument, whether in any case the President of the United States may be required by the Court to perform a purely ministerial act under positive law, or may be held amenable in any case otherwise than by impeachment for crime."

It therefore still remains an open question whether the chief executive of the United States is amenable to the courts, or not. But that the other executive officers of the Government are so amenable is *not* an open question, and has not been so considered since 1803, when the case of *Marbury vs. Madison* was decided. The principle there laid down is still maintained, and the difficulties have arisen, as it was then stated they might arise, in its application to particular cases.

That the Supreme Court of this State, in conceding the exemption of the Governor for judicial process, did not intend such exemption to be extended to the other officers of the Executive Department, is manifest from the language of the opinion *State ex rel. Olino vs. Warmoth* (22 A., 1), and from the fact that the reported decisions of that tribunal, from an early period in its history down to the case of *State ex rel. Collins vs. The Treasurer*, are full of instances in which the power of the courts as to the other officers has been exercised.

To the particular phraseology of the Constitution of 1879, by which the Treasurer and other officers are named as constituting the Executive Department, I attach no importance. The sense of the provisions is not, in my opinion, different from that of similar provisions in preceding constitutions, under which these officials were put as merely branches or adjuncts to the Executive Department, as they are now.

The conclusion from this reasoning and from the authorities is, that officers other than the Governor (who is not involved in this cause), are amenable, in the discharge of ministerial functions, to judicial control.

It remains then to be ascertained whether the case at bar is one in which that control can or should be exercised.

The proceeding in this case, it will be observed, is by injunction, whilst in most of the adjudged cases the relief asked has been the writ of *mandamus* to compel the performance of a duty, rather than the injunction to restrain its violation.

The test of the right to the relief seems to have been considered the same in either case (*Board of Liquidation vs. McComb*, 2 Otto, 532), although upon due scrutiny it is possible that a distinction might be found to exist.

It is sufficient, however, for the purposes of this case, that it has been held, and as this Court believes, upon sound principle, that when the remedy is sought to restrain the violation of a ministerial duty, a writ of injunction will lie (see case of *McComb*, 2 Otto, above referred to).

We have, then, to inquire whether the injunction prayed for in this case is to affect the discharge of a ministerial duty imposed by law upon the defendant?

The Court is not unaware of the difficulty which has been found in discriminating between the duties of a ministerial and those of an executive or political character; nor is it altogether an easy task either to reconcile the decisions upon this subject so as to reach a fixed point in the jurisprudence, or, by rea-

soning, based upon the theory of our Government, to arrive at a conclusion applicable to all cases. Fortunately this is unnecessary, as the case now before the Court is alone to be decided.

In considering the adjudged cases we naturally revert to the first reported decision of the highest tribunal in the country in which the question was considered—the case of *Marbury vs. Madison*, already referred to.

Without recapitulating the irresistible arguments upon which the conclusions of the Court in that case are based, as the language is too terse for abbreviation and the opinion too lengthy to be quoted in full, it is enough to say that the plain meaning of the Court is:

That the judiciary is the proper department to construe the laws of the country, whilst it is the duty of the Executive to see that they are executed *as thus construed*, and not as they may or might be construed by the different officers of the executive or other department.

That it is the sole province of the judiciary to declare authoritatively whether the laws be constitutional or unconstitutional; whether they are to be obeyed by the officers of the Government and the citizens, or disregarded; to whom they apply and to whom they do not apply; whether or in what respect they complied with each other, and the manner in which they are to be enforced. As has already been remarked, the opinion is too long to be quoted in full, but the following extract will indicate the spirit of the whole (1 Branch, p. 70): "It is the province of the Judicial Department to say what the law is. Those who apply the rule in particular cases must of necessity expound and interpret it. If two laws conflict with each other, the courts must decide on the operation *of each*. So if a law be in opposition to the Constitution: if both the law and Constitution apply to a particular case, or that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution disregarding the law, the Court must determine which of these "conflicting

rules governs the case. This is of the very essence of judicial duty."

Let us now compare the views thus expressed with some of the decisions to which the Court has been referred.

In the case of *Decatur vs. Spaulding* (14 Pet., 497) the question arose as to the duty of the Secretary of the Navy, under a general Pension Act and a resolution awarding a particular pension to Mrs. Decatur, the two having passed through Congress upon the same day. Mrs. Decatur claimed that she was entitled to a double pension, and endeavored to obtain it by the means of a mandamus against the Secretary of the Navy.

It was held that the discretion was vested in the Secretary of the Navy to determine which of the two was operative, or whether both the act and the resolution should be obeyed; and the mandamus was refused, although the doctrine that an officer can be coerced with regard to purely ministerial duties was not questioned.

Again, in the case of *Mississippi vs. Johnson* (4 Wallace, 349), it was attempted to restrain the President of the United States from enforcing the "reconstruction acts," upon the ground that they were in controvention of the Constitution of the United States, and consequently null and void.

It was again held that the discretion vested in the President by the acts in question prevented the Court from undertaking to control him. The irresistible logic of this decision is that it was within the President's discretion to execute the laws or not, whether they were constitutional or unconstitutional.

In the case of *G. F. Thompson* (7 Wall., 349), plaintiff sought to restrain the Secretary of the Interior from canceling certain land entries. The injunction was refused upon the ground that the laws upon the subject were so numerous and conflicting that it was necessary for the Secretary to obtain the opinion of the Attorney-General, and that this conflict, and the consequent necessity for the exercise of judgment and discretion in determining by what

rule he would be governed, placed him, as to the laws in question, beyond the control of the judiciary.

Another case to which the Court has been referred is *McCauley vs. Kellogg* (reported in 2 Woods, C. C. Reps., p. 22), where a mandamus against the Governor and other State officers to compel the levy of a tax was refused.

The learned Judge in the conclusion of his opinion referred to a number of cases relied on by the plaintiff, and among others to the cases of *Osborne vs. Bank of the United States* (9 Wheat.) and *Davis vs. Gray* (16 Wallace, 220), upon which he makes the comments:

That in the Osborne case the defendants were held liable as individuals and not as officers. This question the Court will examine hereafter.

As to the case of *Davis vs. Gray*, he says:

" In the case of *Davis vs. Gray*, Davis, who was defendant in the Court below, and who was named in the record as Governor of Texas, was sought to be enjoined from casting a cloud upon the title of complainant to certain lands in Texas by locating warrants thereon, *in pursuance of a void and unconstitutional enactment of the State.* Although he professed to act as Governor, he was impairing the rights of complainant without the authority of any valid law; he was acting in his own wrong and upon his personal responsibility, and was personally liable. * * * How different is the cause under consideration. This is an attempt to compel the public officers of a State to do positive and affirmative acts as such; to compel them to carry out what the complainant conceives to be the law of the State, not in accordance with their own sense of duty and their own interpretation of law."

In the case of *Board of Liquidation vs. McComb* (2 Otto, 532), as in this, and as was attempted in *Mississippi vs. Johnson*, the officers were enjoined from giving effect to and acting under a law claimed to be unconstitutional. It was there held by Mr. Justice Bradley, organ of the Court, as follows: " The objections to proceeding against State officers by mandamus or injunction are: First, that

it is in effect proceeding against the State itself; and secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. "A State, without its consent, cannot be sued by an individual; and a Court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the nonperformance of a violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated as null and void." The Court has particularly referred to the above decisions, because they were rendered at different epochs in the history of the Government, and because they appear to express a contrariety of opinions, not easy to reconcile, upon what constitutes ministerial, and what political, functions.

Assuming it to be true that an unconstitutional law neither gives authority nor affords protection, as was held in *Davis vs. Gray*, and in the *McComb case*, yet how could either enjoin or command an officer with reference to such law without first ascertaining that it was unconstitutional, and, if this be the first step to be taken, how, as in the case of *Mississippi vs. Johnson*, could the relief be refused without taking that step? Again, if the Court can determine in what respect, if at all *quoad* the Constitution, a law may be enforced, upon what principle is such action refused when one law is to be construed *quoad* another law? Without, however, go-

ing further into the intricacies of this discussion, it seems sufficient for the purposes of the immediate question to say that the last decision quoted (*Board vs. McComb*) as being the latest expression upon the subject, and as embodying the correct principle to be applied, will be adopted as the rule here. Applying the rule thus adopted, we find that by Act No. 3 of 1874 certain specific duties were imposed on the State Treasurer, just as other duties were imposed by other laws, and by the provisions under the head of "Treasurer" in the Revised Statutes. Upon the adoption of the Constitution of 1879, and the debt ordinance relied on by the defendant, the laws, generally speaking, prescribing the duties of the Treasurer were continued in force by express provision of the new constitution, but the Act No. 3 of 1874 was continued in force in despite of the new Constitution and the debt ordinance, for the reason that said act constitutes a contract with the bondholders, which neither the Constitutional Convention, nor any other power under the Constitution of the United States, could abrogate or impair. The debt ordinance, as affecting this contract, is in violation of the Constitution of the United States, and, as was said in the case of *McComb*, "an unconstitutional law will be treated as null and void." This being the case, it is as though that ordinance had not been adopted, and the duties of the Treasurer are to be measured by the Act of 1874.

Second. We are next to consider the objection that the State of Louisiana is the real party in interest, but is not and cannot be made a party to the suit, and, consequently, that no injunction can issue. This question and others which follow it were reviewed in the case of *Osborne vs. U. S. Bank* (9 Wheat., 739), with the effect usual in causes decided by Judge Marshall, of illuminating the whole subject with a force of reason too clear to be obscured and too strong to be controverted.

As the case in question covers more than one of the points urged by the learned counsel who represent the defendant, it is important that it should be thoroughly examined and understood. The case

itself may be stated as follows: The Legislature of Ohio passed an act in February, 1819, imposing a tax on banks, reciting that the Bank of the United States pursued its business in the State in violation of the law of the State, and providing that if it continued to do so after the first of September it should be liable to an annual tax of $50,000 for each of its officers, and that on September 15 the Auditor should charge this tax to the bank, and should issue his warrant for the amount under the seal of his office, directed to any person, commanding him to collect the tax; and that such person should enter the bank and demand payment, and in case of refusal to pay should levy the amount on the money or goods of the bank, such money to be retained and such goods sold as if seized under *fi fa.;* the person being authorized to enter every room and search every chest in order to make the levy. Osborne, the State Auditor, gave out that he would execute the act, and a bill was filed by the bank September 14; and, upon notice to Osborne, an order was made for an injunction, conditioned upon the furnishing bond for $100,000, and a subpœna was served on Osborne, early upon September 15. On the eighteenth September, the bond having been furnished, the injunction issued, and was served on Osborne and on J. S. Harper—upon the latter whilst he was on his way to the State capital with the money in his possession, upon which the writ was to operate. In September, 1820, an amended bill was filed, in which it was charged that subsequent to the service of the injunction, to wit., on September 17, 1819, Harper, who was employed by Osborne to collect the tax, seized $100,000, money of the bank, in its office at Chillicothe; that this money was delivered to H. M. Curry, State Treasurer; that Curry kept the same and delivered it to P. Sullivan, his successor in office; that neither Curry nor Sullivan held the money as Treasurer, but as individuals; and the bill prayed that Curry, late Treasurer, Sullivan, his successor and the then Treasurer, and Osborne, the Auditor, in their official and private characters

make discovery and be enjoined from using or paying away the money, or further proceeding under the act, and ordered to restore the money. It appeared from the answers that Curry received the money from Harper and passed it to the credit of the State revenue, but, in fact, kept it separate and apart until January or February, 1820, when the moneys in the Treasury were seized by a committee of the House of Representatives; soon after which he resigned and turned over this money to his successor, Sullivan. Sullivan received the money, but in his answer did not concede its identity, and claimed that he held it only in his capacity of State Treasurer. The case was heard upon these answers and upon the decrees *nisi*, against Osborne and Harper, and the Court pronounced a decree directing them to restore to the bank the sum of $100,000, with interest upon $19,830, the amount of specie in the hands of Sullivan. An appeal was taken to the Supreme Court.

A variety of questions were presented and decided, but those which have any application to this case were stated by the Supreme Court in the form of objections urged by the appellants to the decree of the Circuit Court, as follows:

2. Because as to the defendant Sullivan there are neither proofs nor admissions sufficient to sustain the decree.

3. Because upon equitable principles the case made in the new bill does not warrant a decree against either Osborne or Harper for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because the defendants are decreed to pay interest on the coin when it was not in the power of Osborne or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because the case made in the bill does not warrant the interference of a court of chancery by injunction.

6. Because, if any case is made in the bill, proper for the interference of a court of chancery, it is

against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because the bill assumes that the Bank of the United States is not subject to the taxing power of the State of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

The following extracts from the opinion will sufficiently indicate the reasoning of the Court and the basis of the judgment (p. 831) upon the second point.

The second point is one on which the "decree in favor of the plaintiff most probably depends, for if the claim be not satisfied with the money found in the possession of Sullivan, it is at least uncertain whether a fund out of which it can be satisfied can be found elsewhere.

(833). "We think no reasonable doubt can be entertained but that the $98,000 delivered by Harper to Curry was taken of the bank." * * *

(834). Curry then being clearly in possession of this money and liable for it, we are next to look into Sullivan's answer, &c. * * *

Mr. Curry, as Treasurer of the State of Ohio, received $98,000 as being the amount of a tax imposed by the Legislature of the State on the Bank of the United States, enters the name on the books of the treasury, and, the legality of the act by which the money was levied being questioned, puts it in a bank and keeps it apart from other money belonging to the public. He resigns his office and is succeeded by Mr. Sullivan, to whom he delivers the money. * * Is it possible to doubt the identity of this money?

Upon the third point (836): "If the act of the Legislature of Ohio and the official character of Osborne constitute a defense, neither of these defendants are liable and the whole decree is erroneous; nor if the act be unconstitutional and void, it can be no justification, and both these defendants are to be considered as individuals who are amenable to the laws, &c.

"Upon the fifth point (838): 'The original bill prays for an injunction against Ralph Osborne, Audi-

tor of the State of Ohio, to restrain him from executing a law of that State, to the great oppression and injury of the complainants, and to the destruction of the rights and privileges conferred on them by this charter and by the Constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person who is a State officer from performing any official act enjoined by statute, and whether a court of equity can decree restitution of the act to be performed. In pursuing this inquiry it must be assumed for the present that the act is unconstitutional, &c.

(839) "The appellants expressly waive the extravagant proposition that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs to the extent of the injury sustained in an action at law.

(842) "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the Court, a suit cannot be sustained against the agents of the party, &c. * * * This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, who is the true source of mischief, by whose power and for whose advantage it is done, he himself above the law, be exempt from all judicial process. It would be subversive of the best established principles to say that the Court could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be forced in the suit.

(843) "Why may it not restrain him from the commission of a wrong which it would furnish him for committing?

"Upon the sixth point: The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts the right to invade and is about to invade.

"It prays the aid of the Court to restrain the officers of the State from executing the law. It is true, in a controversy between the bank and the State of Ohio, the interest of the State is direct and immediate, and not consequential. The process of the Court, though not directed against the State by name, acts directly upon it by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the Court ought not to proceed without making the State a party. If this cannot be done, the Court cannot take jurisdiction of the cause.

"The full pressure of this argument is felt and the difficulties it presents are acknowledged, the direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the Court. But this was not in the power of the bank.

(849) "The question, then, is whether the Constitution of the United States has provided a tribunal which can peaceably and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.

"The State of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a State can be sustained against such agent because they would be substantially against the State itself, in violation of the Eleventh Amendment of the Constitution.

(857) "It may, we think, be laid down as a rule which admits of no exception, that in all causes where jurisdiction depends on the party, it is the party named in the record.

"Consequently the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record.

(858.) "The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the the exercise of its jurisdiction, the Court ought to make a decree against the defendant, whether they are to be considered as having a real interest, or as being only nominal parties."

It has been stated in the argument before this Court that the judgment rendered in the case just cited was based upon the fact that the defendants were sued *individually*, but it appears to me that this statement must certainly have been made under a total misapprehension of the case; for, if any one thing is more clear than another in the lucid opinion quoted above, it is that the defendants could be held, and were held, as the agents of the State of Ohio. Although their principal could not be made a party to the suit, and not only this, but that the money then in the treasury of the State, kept separate and apart, it is true, but passed to the credit of the State as a tax collected, could also be held to respond to the judgment.

The position of Sullivan would seem to have been doubly guarded; he succeeded Curry as Treasurer and received the money from him as part of the assets of the State, it being in the treasury at the time of his amotion to office. In his answer he set up that he only knew by hearsay that there was any money in the treasury which had been taken from the bank, and in passing upon this defense, the Court, said as I have quoted: "The second point is one upon which productiveness of any decree in favor of the plaintiffs most probably depends; for if the claim be not satisfied with the money found in the possession of Sullivan, it is at best uncertain whether a fund out of which it can be satisfied can be found elsewhere. Applying these observations to the case at bar, it appears that by virtue of a contract, which forms part of the Constitution of the State of Louisiana, a large sum of money has been collected and set apart in the State treasury exclusively for the

holders of consolidated bonds, and that this money is about to be paid away to some one else, or removed or transferred by the defendant out of the reach of those to whom, if there is any virtue in the guarantee of the Constitution of the United States, it belongs.

It may be said, as was said in the Osborne case, that if the defendant, claiming to act under a void law, removes or pass away this money, he will be personably liable to the parties injured; but assuming this to be true, those parties will have substituted for the money for which they are entitled, and which is now in the place in which they are entitled to receive it, a claim sounding in damages against a private gentleman, who may or may not respond. It may, therefore, also be said, as was said in the Osborne case, that the productiveness of any decree which may be rendered in this case most probably depends upon its being satisfied out of the money now in the hands of the defendant. A distinction between the case quoted and the one now before this Court, which must strike the mind, is this:

The first legislation which imposed any duty upon the State officers of Ohio with regard to the tax to be collected from the United States Bank was the law under which the collection was made, and which was held to be unconstitutional and void. This law being void, no duty was left to be discharged by those officers with reference to the tax in question. It can hardly be said, therefore, that the Court exercised jurisdiction, by reason of the fact that it was enjoining the violation of a ministerial duty, and yet, as we have already shown, the jurisdiction was exercised over the defendants in their official capacity.

In the case before this Court the first laws concerning the tax for the payment of the consolidated bonds of the State imposed specific duties upon the State officers, and the only void legislation yet discovered upon the subject is that which is referred to as abrogating the first. The second being void, the first then stands unimpaired, and the duties im-

posed by it are yet to be discharged. It is apparent, therefore, that whilst the decrees in the case of Osborne may be regarded as resting upon broader grounds, the case at the bar is not only within its meaning, but is strictly within the rule, as laid down in decisions of a later date, particularly the cases of *Davis vs. Gray*, and *Board of Liquidators vs. McComb.*

The third and fourth points of objection rest substantially upon the same ground, that there is no defendant before the Court.

These points, it seems to me, are governed by the reasoning and conclusions in the cases last above referred to.

If the defendant in this case is acting, or is about to act, without the authority of any valid law, he is acting in his own wrong, and his personal liability is a sufficient interest to justify the maintenance of a suit against him. It is true, he claims to be acting only in the capacity of State Treasurer, and he is proceeded against in the name or title by which, in this particular matter, he chooses to call himself.

The fact appears to be that, while he holds the money, which is lawfully in his hands, he is acting in his official capacity, and it is only when he has made some disposition of it not warranted by his official position or duties that his personal liability attaches. Should the plaintiffs wait until that event occurs, the injunction will do no good. The intervenor, Newman, claims an interest in this fund as a general creditor of the State. It follows from the foregoing opinion that as the fund pertains exclusively to the consolidated bonds, he can have no interest in it. It is, therefore, ordered that the intervention herein filed by I. Newman, be dismissed at his costs. It is further ordered that the rule herein taken be made absolute, and accordingly that a writ of injunction issue as prayed for in the petition, upon petitioners furnishing bond, conditioned as the law requires, in the sum of $20,000.

108-76

SUPREME COURT U.S.
FILED
MAR 29 1882
JAMES H. McKENNEY, CLERK

UNITED STATES SUPREME COURT.

STATE OF NEW HAMPSHIRE vs. STATE OF LOUISIANA and others.	2 Original.
JOHN ELLIOTT, Plff. in Error, vs. ALLEN JUMEL, ET AL., Deft. in Error.	Mandamus. No. 845.
SAME, Appellant, vs. SAME, Appellee.	Injunctions. No. 856.

This is a motion to set for a hearing the first of the above entitled cases, and to advance on the docket and set for a hearing at the same time the other two cases.

STATEMENT.

As the facts on which the motions are founded all appear in the record and in the constitution and laws of the State of

Louisiana, it is deemed that a reference thereto is more fitting than an affidavit.

As to the first case there is a stipulation to the effect that it may be set down for any day in March, or such day as may suit the convenience of the Court.

As to the other two cases both sides unite in a motion to advance and set down.

Points.

First. The first case should be set for hearing.

It is an original case. The Court has heretofore declined to hear the case on account of the important questions involved until there was a full Court.

The Court is now full ~~and it is respectfully submitted that the inability of Mr. Justice Hunt to sit should not operate to further delay the hearing~~.

The bill is primarily against State officers to enjoin their diversion of funds, the product of certain taxes, from the payment of coupons held by complainant to which they are pledged to the general purposes of the State administration.

These officers were elected in 1879, and under the constitution of 1879 of the State of Louisianna, hold office for four years only.

Art. 59 of such constitution, speaking of the executive power being lodged in a Governor, adds: "He shall hold his office during four years and together with the Lieutenant-Governor chosen for the same term shall be elected as follows:"

Art. 76 is in these words: "The Treasurer, Auditor, Attorney General, and Secretary of State shall be elected by the qualified electors of the State for the term of four years."

If this suit is not heard before the expiration of the terms of these officers the suit will abate by reason of the expiration of the term of office of the defendants.

~~There is no prospect that within that time Mr. Justice Hunt will be able to sit, and no legal or actual prospect that within that time any other person will be appointed to sit in his place.~~

We therefore submit that to longer postpone the case would be to finally deny a hearing.

Second. As to the other two cases the records show that they involve practically the same questions as the first, except that of the right of a State to sue in this Court.

A brief reference to those questions may be appropriate.

By an Act and Constitutional Amendment of the State of Louisiana of 1874, authority was given to settle certain claims against the State by the issue of certain bonds (see Art. No. 3, Laws 1874).

By Sec. 7 of that Act a tax is levied to pay the interest and principal of said bonds "and the revenue derived therefrom is set apart and appropriated to that purpose and no other," and it is made a felony to divert such fund, and it is made the duty of the Auditor and Treasurer to collect the tax annually and to pay the interest and redeem the bonds.

Pursuant to this law, taxes had been levied and collected applicable to the payment of coupons falling due January 1st, 1880.

In 1879 Louisiana adopted a Constitution by the portion of which, called the debt ordinance, it provided that the coupons of these bonds falling due January 1st, 1880, were remitted, and directed the State officers to apply the money raised to pay them to "defray the expenses of the State Government." Art. 1, 2 and 3, of Debt Ordinance.

Art. 209 of said Constitution of 1879 also cut the State tax, for all purposes, down to six mills on the dollar.

The Law of 1874 levied a State tax of five and a half mills to pay the interest on these bonds—surplus to be applied to purchase.

The plaintiff in error and appellant seeks by these actions to enjoin the diversion of the funds raised by tax to pay the coupons of January 1st, 1880, and to compel the State officers to apply the same to the payment of the coupons, and to continue to levy the tax and appropriate the revenue derived therefrom to the payment of the interest on the bonds.

The State and her officers on the contrary claim the right to use this fund for the general expenses of the State Government, and not to be bound to collect the tax provided by the Law of 1874.

It is difficult to imagine a case where it is more important to the interest of the State to have an early decision,

Her public faith in payment of her obligations,

Her right to use a large portion of her revenue,

Her whole system and scheme of taxation are involved in the decision.

The plaintiffs are also entitled to an advance, because in both the mandamus and injunction suits a hearing after the expiration of the terms of office of the defendants will be useless, and if the cases are not advanced they cannot be heard before the expiration of the terms of office of the defendants.

A copy of the Louisiana Statutes and constitutional provisions herein involved is submitted herewith.

WHEELER H. PECKHAM,

Of Counsel for the motions to set down and advance.

108-76

FILED
APR 11 1882

JAMES H. McKENNEY

Supreme Court

OF THE UNITED STATES.

THE STATE OF NEW YORK,

PLAINTIFF,

against

THE STATE OF LOUISIANA, AND OTHERS,

DEFENDANTS.

BRIEF FOR PLAINTIFF.

LESLIE W. RUSSELL,
Attorney-General of New York.

DAVID DUDLEY FIELD,
Associate Counsel.

DORSHEIMER, BACON & DEYO,
Plaintiffs' Attorneys.

NEW YORK:

Supreme Court of the U. S.

THE STATE OF NEW YORK,
Plaintiff,

against

THE STATE OF LOUISIANA and others,
Defendants.

Brief for Plaintiff.

The Case Stated.

This is a controversy between the State of New York, as plaintiff, and the State of Louisiana, with several financial officers of that State, as defendant. The object of the suit is to procure redress for citizens of New York, whose claims against the State of Louisiana have been openly repudiated. The violation of its most solemn obligations by the State defending this suit is flagrant. No words need be wasted on that point. Whether in aid of public improvements, real or fancied, or under the stress of war, or by compulsion of political plunderers, a debt of many millions had been contracted, in the name and apparently by the authority of that State. This debt was compromised in 1874, the State agreeing to pay sixty per cent. upon the remission of the remaining forty. The compromise was proposed first, by the legislature and then by the people. Nothing was wanting to the solemnity of the act. Bonds designated as consolidated bonds, payable in forty years, with interest at seven per cent., were issued for the agreed sixty per cent. of the debt, and by the same

legislative act and constitutional ordinance, which provided for the issue of the bonds, a continuing tax sufficient to pay them, was laid on all property in the State, and the official machinery was provided for collecting the tax and paying the bonds; that is to say, a tax of five and one-half mills on the dollar of the assessed value of all real and personal property was levied, and the Auditor and Treasurer and a Board of Liquidation, consisting of the Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State, Speaker of the House of Representatives and the Fiscal Agent were directed to assess and collect the tax and pay the bonds. A diversion of the fund from this, its legitimate channel, was declared to be felony; obstruction of the machinery was declared to be a misdemeanor; and finally it was ordained, that each provision of the act was a contract between the State and every holder of the bonds. These measures were taken in order that no further legislation or appropriation should be necessary for the assessment and collection of the tax and the payment of the debt. The consolidated bonds were accordingly issued, and many of them are held by citizens of New York.

These bonds being thus issued and the old debt thereby extinguished, the State turned upon the new creditors and repudiated their demands. Within five years of the time when the statute and constitution just recited took effect, a new ordinance was adopted by the people of Louisiana, purporting to be an amendment of their constitution, by which the interest due January 1st, 1880, was, in the phraseology of the ordinance, remitted, that is, remitted by the debtor, and the bondholders were offered the option of taking, instead of seven per cent. interest every year, two per cent. for the first five years, after January, 1880, three per cent. for the next fifteen, and four per cent. thereafter, or new bonds at the rate of seventy-five cents on the dollar, with interest at four per cent.

We have thus before the Court the State of Louisiana, maker of the bonds, and the financial officers who were charged with the assessment and collection of the necessary taxes and the payment of the debt. The facts thus recited are shown by the pleadings and the evidence. Neither the State nor the individual defendants offer any defense for the State. They simply deny the power of this Court to enforce the demands of justice.

Not even the excuse of inability or inconvenience is offered. With high disdain, the State plants her feet upon her sovereign rights, and the other defendants stand behind her shield. If she had the wealth of the Indies, which her former masters once held in fee; if she had the industrious thrift of that France, into whose hands she passed from Spain, and from which she came to us, she could hardly be more disdainful in her demeanor. Perhaps she may yet learn, that the most gracious as well as the most profitable thing a sovereign can do is to fulfil obligations.

Why should it be thought derogatory to the dignity of a sovereign State to answer in court for its engagements? There is not a commonwealth, save our own, nor a prince in Christendom, save one, that cannot be made thus to answer. Every state of the old world and the new, except the States of this Union, and every prince, except the Czar, may be sued in a court of justice, by foreigner or native, citizen or subject. (Brown's case, 6 Ct. of Claims Rep., 171; Fichera's case, 9 Ct. Cl. Rep., 254.) We shall discover in the issue of the present suit, whether the States of this Union alone, of all the constitutional Governments in the world, are above justice and judgment.

The case now before the Court may be conveniently divided and discussed, in the form of the five following questions:

I. Can a State of the Union implead another State, in this Court, for a money demand?

II. Can it do so, when the demand has been

assigned to it by one of its citizens for the purpose of the suit?

III. Can it do so, as the sovereign and trustee of the citizen, without an assignment of his demand?

IV. If a suit against the State itself could not be maintained in the cases supposed, could the officers of the State of Louisiana, under the circumstances of this case, be required by the judgment of this Court, to apply the money in their hands to the payment of interest on the bonds?

V. And if the money on hand be insufficient to pay the interest now due, can the officers be furthermore directed to go on in the execution of their offices, and assess and collect the taxes required by the constitution and laws of 1874, and pay the arrears of interest out of the same?

First Point.

The first question to be discussed is, therefore, the following: *Can a State of this Union implead another State, in this Court, for a money demand?* That a State may have a money demand against another cannot be doubted.

It may invest its funds for the time being in the stocks, and bonds of sister States, in the same manner as the United States years ago invested the Smithson fund in Arkansas bonds. The United States have at this moment, on deposit with the several States, a large fund accumulated in President Jackson's time, and, by authority of the Congress of that day, deposited in different shares with the different States.

Louisiana probably took her share. It will no doubt be agreed on all hands that, if the Federal Government were now to call upon Louisiana to deliver back the deposit and the State should refuse, the United States might bring suit in this Court

against Louisiana, for the recovery of the debt. In like manner, and for a like reason, a State which has received funds of another State on deposit might be sued by the latter for the return of the money deposited.

Let it not be said, that one State could not receive a deposit from another, because a State cannot enter into an agreement or compact with another State. If Congress consent, the States may enter into agreements with each other. Thus New York or Massachusetts with such consent might advance money to Louisiana. Could it be doubted, that, under such circumstances, either of the lending States might maintain a suit in this Court against the borrower for not repaying the money lent?

The language of the Constitution appears to be free from ambiguity. The word used to denote causes of action is "controversies," the same that is used to denote causes of action between citizens of different States, and that ever since the Judiciary Act of 1789, has been held to include money demands. Observe the context: "The judicial power shall extend * * * to controversies in which the United States shall be a party; to controversies between two or more States; between a State and the citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; between a State, or citizen thereof, and foreign States, citizens or subjects." Judging by the language of the Constitution alone, there is no reason to doubt, that, if a State have a money demand against another State, it may, as a general rule, bring the matter before this Court as a controversy between the two.

If judicial decisions in explanation of the constitution were needed, they were given in the first years of this Court. When the Constitution went into effect, there were many private claims against the States, and the claimants sought redress in the Federal Courts. Suits, as we all know, were

brought in this Court against different States, and upon money demands. Eight such at least are mentioned in three volumes of Dallas.

Vanstophorst *agst.* Maryland, 2 Dallas, 401.
Oswald *agst.* New York, 2 Dallas, 401, 402 and 415.
Chisholm *agst.* Georgia, 2 Dallas, 419.
Grayson *agst.* Virginia, 3 Dallas, 320.
Hollingsworth *agst.* Virginia, 3 Dallas, 378.
Huger *agst.* South Carolina, 3 Dallas, 339.
Cutting *agst.* South Carolina, 2 Dallas, 415, note.
New York *agst.* Connecticut, 4 Dallas, 1.

In one of these cases, Chisholm *agst.* Georgia, the jurisdiction of the Court was objected to, argued and decided. The argument took place at the February Term 1793. Two suits had been previously brought, one against Maryland and the other against New York. In Chisholm's case, as appears by the report, "Ingersoll and Dallas presented to the Court the written remonstrance and protestation of the State against the exercise of jurisdiction in the cause, but in consequence of positive instructions they declined taking any part in arguing the question." The case was, thereupon, argued on behalf of the plaintiff by Mr. Randolph, then Attorney-General. There were six judges of the Court, Jay being Chief Justice; one, Mr. Justice Johnson, appears to have been absent. The argument of Mr. Randolph was exhaustive, and every judge hearing the case delivered an opinion, four being in favor of the jurisdiction, and one against it. The dissenting opinion of Mr. Justice Iredell shows that the defendant's case did not suffer for want of an argument at the bar. The following is an extract from the opinion of the Chief Justice: extracts from the opinions of the other judges will be given in an appendix.

"The question we are now to decide has been accurately stated, viz.: Is a State suable by individual citizens of another State?

"It is said that Georgia refuses to appear and answer to the plaintiff in this action, because she is a *sovereign* State, and therefore not *liable* to such actions. In order to ascertain the merits of this objection, let us inquire: 1st. In what sense Georgia is a sovereign State? 2d. Whether suability is incompatible with such sovereignty. 3d. Whether the Constitution (to which *Georgia* is a party) authorizes such an action against her." * * *

"2d. The second object of inquiry now presents itself, viz.: Whether suability is compatible with State sovereignty.

"Suability, by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are *actually* sued, though not *personally*, sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of *Delaware*, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand and fifty odd thousand make any distinction as to right? Is is not as easy, and as convenient to the public and parties, to serve a summons on the Governor and Attorney General of *Delaware*, as on the Mayor or other officers of the Corporation of *Philadelphia?* Will it be said that the fifty odd thousand citizens in *Delaware*, being associated under a State Government, stand in a rank so superior to the forty odd thousand of *Philadelphia*, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a court of justice, yet that such a procedure would not comport with the dignity of the former? In this land of equal liberty shall forty odd thousand in one place be compelled to do justice, and yet fifty odd thousand in another place be privileged to do justice *only* as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of *Delaware* holds an office of superior rank to the Mayor of *Philadelphia*, they are both, nevertheless, the officers of the people; and however more exalted the one may be than the other, yet, in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.

"If there be any such incompatibility as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this, any one State in the *Union* may sue another State, in this Court, that is, all the people of one State may sue all the people of another State. It is plain, then, that a State may be *sued*, and hence, it plainly follows, that *suability* and *State sovereignty* are not incompatible. As one State may sue another State in this *Court*, it is plain that no degradation to a State is thought to accompany her appearance in this *Court*. It is not, therefore, to an appearance in this *Court* that the objection points. To what does it point? It points to an appearance at the suit of one or more citizens. But why it should be more incompatible, that all the people of a State should be sued by *one* citizen than by one hundred thousand I cannot perceive, the process

in both cases being alike; and the consequences of a judgment being alike. Nor can I observe any greater inconveniences in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light. But if any reliance be made on this inferiority as an objection, at least one *half* of its force is done away by this fact, viz., that it is conceded that a State may appear in this Court as plaintiff against a single citizen as defendant; and the truth is, that the State of *Georgia* is at this moment prosecuting an action in this Court against two citizens of South Carolina."

This case certainly decided, that the Constitution included money demands, among those, which would constitute a cause of action in this Court, against a State.

Second Point.

Can one State implead another on a money demand *when the demand has been assigned for the purpose of suing?* This question might well be answered by asking another: why may it not? A State of the Union may do anything not forbidden by the Constitution of the United States, or by the law of nations. It is not in such a condition of pupilage that it needs an enabling act before it can take an assignment of a debt. Its capacity to contract is an incident of its sovereignty, nay, it is an incident of its corporate existence. Whatever a corporation may do, it may agree to do. If it may pay money it may agree to pay; if it may receive money, it may accept an agreement for it. If New York may receive from A his promise to pay money, it may receive from B a transfer of A's promise. That rule of the Common Law of England, which prohibited an assignment of a thing in action, was the growth of a social condition that long since passed away. Even in England the rule never applied to the sovereign; and in this country the rule as applied to private dealings may be and is now generally changed by legislative authority. In New

York the rule, so far as relates to assignments by individuals to the State, is expressly abrogated by the statute under which the assignment in the present case was made and received; and in fact the rule long ago ceased to exist, in respect to transactions between man and man. It cannot be doubted, therefore, that the assignment by citizens of New York to the State of New York of a money demand is a valid transfer, according to the law of the place where the assignment was made.

The demand being thus vested in the State carries with it the right to demand payment and to give an acquittance when payment is made. If it may demand payment, it may follow up the demand by suit, unless there be some positive prohibition to sue. That provision of the Judiciary Act, which forbade suits in the Circuit Courts by the assignee of certain things in action was valid only because Congress had authority to restrict the jurisdiction of the Circuit Courts as it pleased; but Congress could not forbid a suit in a State court by an assignee under the same circumstances, nor could it invalidate the assignment. The act of Congress affected only the jurisdiction of an inferior federal court. It did not, as it could not, affect the validity of the transfer. The original jurisdiction of the Supreme Court is not within the control of Congress. It could no more enact that an assigned demand for money should not be sued on in this Court than it could enact that an assigned demand for land should not be sued on. A small strip on the western side of the Taghconic Mountains was some years ago ceded by Massachusetts to New York, with the consent of Congress (see act of January 3, 1855). If a suit were now to be brought by New York against Massachusetts respecting Boston Corners, would anybody dream of contesting the jurisdiction, because the land had been assigned to New York?

The assignability of demands is one of the prominent features of modern society. Consider what would be the condition of traffic if one could not

transfer to another his claim upon a third. The invention of bills of exchange has been attributed to the Lombards of the Middle Ages, and they have proved to be great agencies of civilization. The transactions at the New York Clearing House have been sometimes nearly three hundred millions in a single day. What are these transactions but transfers of credits, and how would merchants, how would any of us, get on, if a debtor were obliged to send the coin for the discharge of his debt, instead of assigning, as he does now, by means of a check or draft, a claim upon his banker?

The consolidated bonds of Louisiana and their coupons are negotiable securities by the laws of Louisiana as of New York. And if they were not thus negotiable, they are assignable by the law of New York, where the coupons are payable at the option of the holder; so that in any view of the transaction, the title of the holder of the bond or coupon to demand and receive payment in his own name is beyond question.

Will it be said that this suit, if sanctioned, will be an evasion of the eleventh amendment of the Constitution? In other words, to give the objection its full force, will not the success of this suit enable the citizen to do indirectly what the amendment forbids his doing directly? This question, no doubt, deserves serious consideration, for an evasion of the Constitution is hardly less reprehensible than its direct violation. Let us consider, then, first, whether the language of the amendment, in its natural significance, forbids such a suit; and, secondly, whether the intent, though unexpressed, was to forbid it. First, as to the language. "The judicial "power of the United States shall not be construed "to extend to any suit in law or equity, commenced "or prosecuted against one of the United States *by* "*citizens of another State*, or by citizens or subjects "of any foreign State." Most certainly the present suit is not within the language of this amendment, however it be construed. This is not a suit by citizens

of another State; it is a suit by the State of New York, whose title rests, partly and chiefly, upon the tie between the State and the citizen, of protection on the one hand and allegiance on the other, and partly upon a formal transfer by its citizens of their several demands. Is the suit, then, within the reason and intent of the amendment? This is a broader question, but one to which can be given, as we think, just as confident an answer. If it were intended to prevent suits by a State for the demands of its citizens, why was not the intent expressed? The idea of suits by assignees, and the desirability of forbidding or restricting them in some cases, must have been present in the minds of the members of Congress, when the amendment was proposed, for the judiciary act, which forbade suits in the Circuit Court by assignees of negotiable paper, had been passed three years before. The fact that such an intent was not expressed in the amendment is the highest evidence that it was not entertained. "*Expressio unius est exclusio alterius*," is one of the canons of criticism, and all the more effective, when it is shown that the idea of both was in the minds of those who used the expression. The reason of the amendment does not include the present action. That reason was, not to protect the States from suits, but to protect them from suits by private persons. Whether well or ill founded, an idea was then prevalent that it was beneath the dignity of a sovereign State to answer at the bar to a private person, an idea which has now pretty much gone out of vogue, since the United States themselves, as well as the proudest and most powerful monarchies of Europe, can be sued in their own courts. There was, perhaps, another reason, which had in it some force, which was, that if individuals could sue, a State might be exposed to an indefinite number of plaintiffs; whereas, if only a State could sue then these few (fifteen then and thirty-eight now) could bring an action. A State is

supposed to act with that deliberation and caution which become those that bear high trusts, and to be incapable of bringing vexatious suits. These, after all, are speculations. What we know is, that the Supreme Court, by the voices of four out of five of its judges, one of them being, with Hamilton and Madison, author of the Federalist and earliest expositor of the Constitution, pronounced, as the judgment of the Court, that a State could be sued for a money demand by a private citizen of another State, and that when the Congress and the States together amended the Constitution, they carried the amendment no further than to prohibit such a suit by a private citizen. The other provisions of the Constitution remained intact, and, with this judgment, have now for four score years and ten declared, as the law of the land, that one State could sue another for a money demand, whenever the pursuing State had a valid title to such a cause of action.

Nor can the motive of the purchase or assignment be material, unless made so by positive law. When Mr. Astor moved across the Hudson into New Jersey, that he might sue, in the Circuit Court of the United States, for land in the highlands, which had been supposed to be forfeited at the revolution, for the treason of the proprietors of the great manors bounded by the river, the objection was made, that his citizenship in New Jersey had been taken up for the purpose of suing, but the objection was overruled. So, here, the assignment of the coupons in the present case was made under the statute of New York, for the purpose of the present action, not, it is supposed, because it was essential, but by way of further assurance. It was the practice, we believe, in the earlier stages of the Alabama depredations, for the owners of vessels and cargoes destroyed to assign their claims to the United States, but the practice was discontinued as unnecessary. When Mr. Curtis, once a judge of this court, then returned to the bar, gave his opinion that a portion of the

Cayuga tribe of Indians living in Canada had a valid claim against the State of New York, for the payment of an annuity, he advised that their claims should be assigned to the Queen of England, by whom a suit could be brought in this Court against the State. (Curtis's Life and Writings, vol. I, p. 281. See also vol. II, pp. 93-148). (See McDonald *agst.* Smalley, 1 Pet., 623; Bonnafee *agst.* Williams, 3 How., 577.) The real ground however of the present suit is the right and duty of New York, as a sovereign State, sovereign in all things save as subordinated to the Union by the Federal compact, to assert the rights of her citizens, when they have been despoiled by another State, and there are no other means of redress. Such appear to be the purpose and purport of the statute of New York, passed in 1850, under which this suit is brought, its title being: "An Act to protect the rights of citizens of this State, owning and holding claims against other States." And this brings us to the third question, which we propounded at the beginning.

Third Point.

Can the State of New York, as the sovereign and trustee of the citizens of the State, implead the State of Louisiana in this court, for the violation of the latter's obligations to those citizens?

This question has two branches: one, what would have been the claim of New York upon Louisiana, if there had been no Federal Constitution; and the other, whether the Constitution has provided a substitute for the enforcement of the claim, or extinguished it altogether.

If New York had remained an independent State, with no federal tie, she would have been, at this moment, one of the nations of the earth, more populous, more opulent, and more powerful than Por-

tugal, or Greece, or Switzerland, or Belgium, or Holland, or Denmark. If her citizens had valid claims upon Louisiana, which the latter refused to satisfy or to acknowledge, there would then have been a controversy between New York and Louisiana, in which the causes of complaint could have been as sharply defined, and the course of procedure as well marked out, as if the law were national, instead of international, and the practice were prescribed by the statutes of a common superior. The constitution has changed all this. New York cannot now negotiate with Louisiana, or issue letters of marque and reprisal, or declare war. In place of these means of redress, we submit that New York can summons Louisiana before this Court, make here complaint, and receive here redress. It is one of the most beneficent, as it is one of the greatest functions of this judicature, to sit in judgment between such litigants, and if any cause of complaint cannot be preferred here, which could have been preferred in the older time, then by so much have the rights of the States and citizens been extinguished by the constitution, without corresponding protection in return. To the development of these propositions, we venture now to ask the attention of the Court.

First, as to the right and duty of every sovereign State, on behalf of its citizens, to call upon any other sovereign State for the fulfillment of its obligations to those citizens. This is an established rule of international law. Our own country has acted upon it so often, that with us it is no longer an open question. Our diplomatic correspondence is full of references to it. Take, for example, this one: Mr. Marcy, Secretary of State, instructed Mr. Clay, our Minister to Peru, not "to make a demand for a breach of contract without special authority," (Law. Wheat. 501.) The claims upon the French Government, assumed by the treaty of Louisiana; the claims upon France, Portugal, and Denmark, growing out of spoliations during the wars of Napoleon,

the claims upon Mexico, for which we received the cession of California; the claims upon Great Britain for the spoliation of rebel cruisers, in respect of which we had the award of the tribunal of Geneva, and the later claim upon Bolivia, for a debt to an American citizen, are so many proofs of the existance of the rule.

By an old act of the English Parliament, 4 Hen. IV., Chap. 7, it was declared: "That if any subjects of the realm are oppressed in time of peace by any foreigners, the King will grant marque in due form to all that feel themselves aggrieved;" and in the French Ordonance de la Marine of 1681 is this provision: "Ces de mes sujets dont les navires ou autres effets auront eté pris ou arretés hors de fait de la guerre par les sujets des autres Etats, seront tenues, avant qu 'il avait recours á nos lettres de repraiselles," &c., &c. Grotius, Book 3, Chap. 2, section 5, subdivision 2, says: "The rule then, that for such a cause, either the bodies or the movables of the subjects of him who does not grant me justice may be taken by me, is not indeed introduced by nature, but is everywhere received as usage. The oldest example is in Homer, where Nestor says he took the flocks and herds of the Elidians as reprisals for his father's horses, and he goes on to say that he summoned all those to help him who had any debts owing from the Elidians."

Vattel, Book 2, Chap. 18, page 347, Chitty's Edition, with Ingersoll's Notes, 1869, says: "In the same manner the sovereign demands justice or makes reprisals, not only for his own concerns but for those of his subjects, whom he is bound to protect, and whose cause is that of the nation."

Patrick Henry in 1784 proposed the following resolution to the Legislature of Virginia. (Rives' Life and Times of Madison, Vol. 1. page 564, Vol. 2, page 41.) "Resolved, that the delegates representing this State in Congress ought to be instructed to urge in Congress all measures necessary for accelerating a fair and final settlement of the ac-

counts subsisting between the United States and individual States, and that whenever such settlement shall have been accepted, the payment of the balance appearing thereupon to be due (or estimated by Congress to be due in case of obstruction or failure of a definite mode of settlement, as a subsequent resolution provided) ought to be enforced, if necessary, by such distress on the property of the defaulting States, or of their citizens, as by the United States in Congress assembled, may be deemed adequate and most eligible."

Manning (Law of Nations, Amos' Edition 75, page 150), says: "Reprisals constitute a method whereby a nation obtains justice for its injured subjects when such justice cannot be obtained by friendly methods * * * Reprisals can only be issued on the denial or delay of justice, and are exclusively a means of obtaining compensation for the injured subjects of the State that grants them."

Twiss, Vol. 2, Sec. 11 (referring to Grotius, Book 3, page 2, Section 14; Puffendorf, Book 1, page 13. Section 10; Vattel, Book 2, page 342), says: "If a nation has refused to pay a debt to, or has inflicted an injury upon, the subjects of another nation, and the former has refused to make satisfaction or to give redress, the latter may proceed to do justice to its subjects by making reprisals upon the former."

One of the latest and fullest treaties upon international law has set forth the rule, and the procedure recognized for the inforcement of it, in language so clear, that we are tempted to quote some of it here, leaving fuller extracts to the appendix.

Phillimore in his Third Chapter of Part 5, thus states the rule: (Phill. Int. Law, 2 Lon. Ed., Vol. 2, p. 8) "The right of interference on the part of a State, for the purpose of enforcing the performance of justice to its citizens from a foreign State, stands upon an unquestionable foundation, when the foreign State has become itself the debtor of these citizens." In another chapter entitled "International right of action," he says:

"In the case of individuals, a redress for this infringement of right and neglect of obligation is provided for in every system of National or Municipal Law. In these systems the individual is furnished with a *Right of Action*, and the regulation of this right, in all its various shapes forms the subject of a *Code of Procedure;* whether there be, as in the case of most Continental States, such a Code made by express enactment part of a general Code of Law, or whether as in England such a Code *practically* exists in usage and judicial precedent amended and amplified by positive statute.

"In the system of International Law, this Civil Right of Action becomes of necessity an appeal to arms, for war is the terrible litigation of States.

"By what rules this International Right of Action is governed, both with respect to the *principals* in the suit and to the *bystanders*, we shall presently consider at length."

Such, therefore, were it not for the federal constitution, would have been the rights, and the remedies for the enforcement of the rights, on the part of New York against Louisiana. Our contention is, that, in their stead, under the constitution, the right of New York to demand of Louisiana the fulfilment of her obligation, to pay her debts to citizens of New York, exists as fully as before, and that in place of negotiation, arbitration, embargo, reprisal, or war, as the means of enforcing the right, there is substituted an orderly and peaceful litigation in this Supreme Court of the Union.

Under the articles of confederation the right of one State to proceed against another, in a special tribunal created for the purpose, was clearly pointed out and provided for. The language was as comprehensive as could be written: "The United States in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting or that hereafter may arise, between two or more States, concerning boundary, jurisdiction, *or any other cause whatever*." Can there be a doubt

that if in 1788, New York had made such a claim against any other of the States then in the Union, as she now makes against Louisiana, that claim might have been brought before the tribunal provided by the ninth article of the confederation? And is there reason to suppose, that the right of one State to proceed against another was made less under the Constitution than it was under the Confederation? Is it not certain, that the Constitution was intended to provide the means of protecting and enforcing every right, which one State could have against another? The debates in this Convention of 1787 seem to be decisive.

The draft reported by the Committee of Detail provided that "all disputes and controversies * * between two or more States respecting jurisdiction or territory," or lands granted by different States, should be adjudged by the Senate, and that the jurisdiction of the Supreme Court should extend to "actions between two or more States (except such as shall regard territory or jurisdiction)." This exception was stricken out. Why it was stricken out Madison's Debates show:

"Mr. Rutledge said that this provision for deciding controversies between the States was necessary under the Constitution, but will be rendered unnecessary by the national judiciary now to be established; and moved to strike it out."

"Doctor Johnson seconded the motion.

"Mr. Sherman concurred. So did Mr. Dayton.

"Mr. Williamson was for postponing instead of striking out, in order to consider whether this might not be a good provision in cases where the judiciary were interested or too closely connected with the parties.

"Mr. Gorham had doubts as to striking it out. The judges might be connected with the States being parties. He was inclined to think the mode proposed in the clause would be more satisfactory than to refer such cases to the judiciary.

"On the question for postponing the second and third sections, it passed in the negative:

"New Hampshire, North Carolina, Georgia, Aye —3; Massachusets, Connecticut, New Jersey, Delaware, Maryland, Virginia, South Carolina, No —7; Pennsylvania absent.

"Mr. Wilson urged the striking out, the judiciary being a better provision.

"On question for striking out the second and third sections of Article 9:

"New Hampshire, Connecticut, New Jersey, Delaware, Maryland, Virginia, South Carolina, Aye—8; North Carolina, Georgia, No—2; Pennsylvania absent."

In the 80th number of the *Federalist*, Mr. Hamilton discussed the judiciary articles of the Constitution, and among other things, said:

"It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases. * * * * * 4th. To all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves. * * * * *

"The fourth point rests on this plain proposition, that the peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquility. A distinction may perhaps be imagined, between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. * * * * *

"But it is at least problematical whether an unjust sentence against a foreigner, where the subject of the controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty, or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the controversies in which foreigners are parties involve national questions that it is by far most safe, and most expedient, to refer all those in which they are concerned to the national tribunal."

In the Virginia convention, which ratified the Constitution, Governor Randoph made use of this language:

"Harmony between the States is no less necessary than harmony between foreign States and the United States. Disputes between them ought, therefore, to be decided by the federal judiciary.

"Give me leave to state some instances which have actually happened, which prove to me the necessity of the power of deciding controversies between two or more States. The disputes between Connecticut and Pennsylvania, and Rhode Island and Connecticut have been mentioned. I need not particularize these. Instances have happened in Virginia; there have been disputes respecting boundaries under the old Government, as well as this; reprisals have been made by Pennsylvania and Virginia on one another. Reprisals have been made by the very judiciary of Pennsylvania on the citizens of Virginia."

The extent of the jurisdiction over controversies between the States, and the manner of exercising it, have been so often considered by the Court, that a reference to the cases is hardly necessary. Thus the suit of New Jersey against New York, begun in 1830, appears three times in the reports, and that of Rhode Island against Massachusetts, begun in 1832, appears five times. (New Jersey *agst.* New York, 3 Pet. 466, 5 Pet. 283, where Chief Justice Marshall goes over the subject, and 6 Pet. 323 Rhode Island *agst.* Massachusetts 12 Pet. 658, where the jurisdiction was considered at length by Mr. Justice Baldwin, 13 Pet. 23, 14 Pet. 211, 15 Pet. 234, and 4 How. 591.)

In Poole agst. Fluger, 11 Pet. 209, Mr. Justice Story, delivering the opinion of the Court, used this language respecting the rights of the States, under the law of nations, independent of the constitution. The italics are ours.

* * * "It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as

the true and real boundaries. *This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States.* So far from there being any pretence of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction requiring the consent of Congress. The Constitution declares, that 'No State shall, without the consent of Congress, enter into any agreement or compact with another State;' thus plainly admitting that, with such consent it might be done; and in the present instance that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."

Fourth Point.

If a suit against the State itself could not be maintained in the circumstances of the present case, the financial officers of the State can be required, by the judgment of this Court, to apply the money in their hands to the payment of interest on the consolidated bonds, according to the compact of 1874.

The debt ordinance of 1879 is the only obstacle in the way of payment. This ordinance, being invalid, because it would impair the obligation of the original contract, should be treated as a nullity, leaving the law and ordinance of 1874 in full force. The financial officers of the State must be supposed to have obeyed either one ordinance or the other. In either event they would have a large sum of money in their hands. We know, from the statute of 1881, which is in evidence, that they have it. This money can be reached by the process of the court. Public

funds appropriated to individual uses have been over and over again reached by judicial process. (Kendall's case, 12 Pet. 527; Smyth's case, 5 Nev. & Man. 589; 6 Nev. & Man. 508.)

Fifth Point.

Should the money now in the hands of the financial officers of the State prove insufficient to pay the interest accrued, these officers may be ordered by the Court to proceed in the execution of the contract, assess and collect the tax, and out of the proceeds discharge the arrears. This is merely the fulfillment of the compact, which, having been made by the people, in their sovereign capacity, requires no further legislation to carry it into effect. The Court has already in several instances acted upon this principle.

Board Comrs., Knox County *v.* Aspinwall and ors., 24 How. U. S., 376.
Supervisors *v.* United States, *ex rel.*, 4 Wallace, 435.
Van Hoffmann *v.* City of Quincy, 4 Wall, 535.
City of Galena *v.* Amy, 5 Wall., 705.
Walkey *v.* City of Muscatine, 6 Wall., 481.
Mayor *v.* Lord, 9 Wall., 409.
United States *v.* Boutwell, 17 Wall., 604.
Heine *v.* Levee Commissioners, 19 Wall., 655.
Loan Association *v.* Topeka, 20 Wall., 655.
Board of Liquidation *v.* McComb, 2 Otto (92 U. S.), 531.
United States *v.* Memphis, 7 Otto (97 U. S.), 284.
Memphis *v.* United States, 7 Otto (97 U. S.), 293.
Memphis *v.* Brown, 7 Otto (97 U. S.), 300.
United States *v.* Fort Scott, 9 Otto, 152 (99 U. S.).
County of Greene *v.* Daniel, 12 Otto (102 U. S.), 189.
Louisiana *v.* New Orleans, 12 Otto (102 U. S.), 203.
Louisiana *v.* United States, 13 Otto (103 U. S.), 289.
Wolff *v.* New Orleans, 13 Otto (103 U. S.), 358.

Sixth Point.

In exercising its jurisdiction, upon the theory thus contended for, the Court will give the sanction of law to the dictates of morality. The history of Louisiana repudiation is a history of shameless perfidy. It can be accounted for only upon the supposition, that a majority of the people of the state considered themselves as much beyond the reach of law, as they were beyond the influence of the world's opinion. If they should be adjudged free of all restraint, they would be enrolled among those, whom, to use the fiery language of Burke, "no treaty and no signature could bind," and "against whom the faith which holds the moral elements of the world together was no protection." Let us hope, that they will be admonished, by the judgment here to be pronounced, that however worthless, among themselves, they may consider their own promises, they will be held to fulfil them towards the rest of the world.

LESLIE W. RUSSELL,
Attorney-General of New York.

DAVID DUDLEY FIELD,
Associate Counsel.

DORSHEIMER, BACON & DEYO,
Plaintiff's Attorneys.

Appendix A.

Extracts from the Argument of Mr. Randolph and from the Opinions of the Judges, other than the Chief Justice, in Chisholm *agst.* Georgia.

Edmund Randolph, Attorney-General, arguing for the plaintiff, thus spoke of the objections that no process of execution against a State had been provided.

"But, after all, although no mode of execution should be invented, why shall not the Court proceed to judgment? It is well known, that the Courts of some States have been directed to render judgment, and there stop; and that the chancery has often tied up the hands of the common law in a like manner. Perhaps, if a Government could be constituted without mingling at all the three orders of power, Courts should, in strict theory, only declare the law of the case, and the subject upon which the execution is to be levied; and should leave their opinions to be enforced by the Executive. But that any State should refuse to conform to a solemn determination of the Supreme Court of the Union, is impossible, until she shall abandon her love of peace, fidelity to compact, and character."

* * * * * * * * * * *

Iredell, *J.*, put his decision against the jurisdiction, chiefly on the want of an Act of Congress, summing up as follows. 2 Dall. 449:

"I have now, I think, established the following particulars. 1st. That the constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding. 2d. That *Congress* has provided no new law in regard to this case, but expressly referred us to the old. 3d, That there are no principles of the old law, to which we must have recourse, that in any manner authorize the present suit, either by precedent or by anology."

* * * * * * * * * * *

And again, p. 449:

"My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however,

has been said on the constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial."

Blair, *J.*, p. 451:

"It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is defendant, it would renounce part of the authority conferred, and consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where *a State is a party*. Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that *Congress* has not provided any form of execution or pointed out any mode of making the judgment against a State effectual; the argument *ab in utili* may weigh much in cases depending upon the construction of doubtful Legislative acts, but can have no force, I think, against the clear and positive directions of an act of *Congress* and of the Constitution. Let us go on as far as we can; and if, at the end of the business, notwithstanding the powers given us in the 14th section of the judical law, we meet difficulties insurmountable to us, we must leave it to those departments of Government which have higher powers; to which, however, there may be no necessity to have recourse; Is it altogether a vain expectation, that a State may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the *United States*, though not conformable to their own ideas of justice?"

* * * * * * * * * * *

Wilson, *J.*, p. 453:

"This is a case of uncommon magnitude. One of the parties to it is a *State*: certainly respectable, claiming to be *sovereign*. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amendable to the jurisdiction of the Supreme Court of the *United States?* This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less *radical* than this—'Do the people of the *United States* form a *Nation*'?"

* * * * * * * * * * *

p. 466:

"But, in my opinion, this doctrine rests not upon the legitimate results of fair and conclusive deduction from the Constitution; It is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of

the Constitution itself. 'The judicial power of the *United States* shall extend to controversies between *two* States.' *Two* States are supposed to have a controversy between them. This controvesy is supposed to be brought before those vested with the judicial power of the *United States*. Can the most consumate degree of professional ingenuity devise a mode by which this 'controversy between two States' can be brought before a Court of law; and yet neither of those States be a defendant? 'The judicial power of the *United States* shall extend to controversies between a *State* and *citizens* of *another* State.' Could the strictest legal language; could even that language, which is peculiarly appropriated to an act, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal?"

* * * * * * * * * * *

Cushing, *J.*, p. 466:

"The grand and principal question in this case is, whether a State can, by the Federal Constitution, be sued by an individual citizen of another State?

"The point turns not upon the law or practice of *England*, although it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the *United States;* and particularly upon the extent of powers given to the Federal Judicial in the 2d section of the 3d article of the Constitution. It is declared that (the judical power shall extend to all cases in law and equity arising under the constitution, the laws of the *United States*, or treaties made or which shall be made under their authority; to all cases affecting ambassadors or other public ministers and consuls: to all cases of admiralty and maratime jurisdiction; to controversies to which the *United States* shall be a party; to controversies between two or more States and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State and citizens thereof and Foreign States, citizens or subjects!) The judicial power, then, is expressly extended to '*controversies between a State and citizens of another State?* When a citizen makes a demand against a States, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to subject a State to be a defendant, because it would effect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause; '*controversy between two or more States,*' where a State must of necessity be defendant? If it was not the intent, in the very next clause also, that the State might be made defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made, if one was intended?"

Appendix B.

Extract from Phillimore's International Law.—Vol. II., page 8.

CHAP. III.

Right of Protecting Citizens in Foreign Countries.—Debts of the State.

V. The right of interference on the part of a State, for the purpose of enforcing the performance of justice to its citizens from a foreign State, stands upon an unquestionable foundation, when the foreign state has become itself the debtor of these citizens.

It must, of course, be assumed that such State has, through the medium of its proper and legitimate organs, contracted such debt, whether that organ be the Sovereign alone, according to the constitution of Russia, or the Sovereign and Parliament, according to the constitution of England, the debt so contracted with foreign citizens, whether in an individual or a corporate capacity, constitutes an obligation of which the country of the lenders has a right to require and enforce the fulfilment. Whether it will exercise that right or not is a matter for the consideration of its private domestic policy; "Les emprunts," Vattel says, with great precision (Vattel, l. ii. c XIV. s. 216), "faits pour le service de l'Etat, les dettes créées dans l'administration des affaires publiques, *sont des "contrats de droit étroit*, obligatoires pour l'État et la nation entière. "Rien ne peut la dispenser d'acquitter ces dettes-là. Dès qu'elles ont "été contractées par une puissance légitime, *le droit* du créancier est "inébranlable."

And he adds, anticipating a revolutionary argument of later times: "Que l'argent emprunté ait tourné au profit de l'État, ou qu'il ait "été dissipé en folles dépenses, ce n'est pas l'affaire de celui qui "prête. Il a confié son bien à la nation; elle doit le lui rendre. "Tant pis pour elle si elle a remis le soin de ses affaires en mauvaises "mains."

It seems to have been in accordance with this important rule of International Law, that the following circular was addressed, in 1848, by Viscount Palmerston, the Secretary of State for Foreign affairs, to the British representatives in foreign States:

"Foreign Office, January, 1848.

"Her Majesty's Government have frequently had occassion to in-"struct her Majesty's representatives in various foreign States to make "earnest and friendly, but not authoritative representations, in support "of the unsatisfied claims of British subjects who are holders of pub-"lic bonds and money securities of those States.

"As some misconception appears to exist in some of those States "with regard to the just right of Her Majesty's Government to in-"terfere authoritatively, if it should think fit to do so, in support of "those claims, I have to inform you, as the representative of Her "Majesty in one of the States against which British subjects have

"such claims, that it is for the British Government entirely a ques-
"tion of discretion, and by no means a question of International
"Right, whether they should or should not make this matter the
"subject of diplomatic negotiation. If the question is to be consid-
"ered simply in its bearing upon International Right, there can be no
"doubt whatever of the perfect right which the Government of every
"country possesses to take up, as a matter of diplomatic negotiation,
"any well-founded complaint which any of its subjects may prefer
"against the Government of another country, or any wrong which
"from such foreign Government those subjects may have sustained;
"and if the Government of one country is entitled to demand redress
"for any one individual among its subjects who may have a just but
"unsatisfied pecuniary claim upon the Government of another coun-
"try, the right so to require redress cannot be diminished merely be-
"cause the extent of the wrong is increased, and because instead
"of there being one individual claiming a comparatively small sum,
"there are a great number of individuals to whom a very large
"amount is due.

"It is therefore simply a question of discretion with the British
"Government whether this matter should or should not be taken
"up by diplomatic negotiation, and the decision of that question of
"discretion turns entirely upon British and domestic considera-
"tions.

"It has hitherto been thought by the successive Governments of
"Great Britain undesirable that British subjects should invest their
"capital in loans to foreign Governments instead of employing it in
"profitable undertakings at home; and with a view to discourage
"hazardous loans to foreign Governments, who may be either unable
"or unwilling to pay the stipulated interest thereupon, the British
"Government has hitherto thought it the best policy to abstain from
"taking up as International Questions the complaints made by
"British subjects against foreign Governments which have failed to
"make good their engagements in regard to such pecuniary trans-
"actions.

"For the British Government has considered that the losses of
"imprudent men, who have placed mistaken confidence in the good
"faith of foreign Governments, would prove a salutary warning to
"others, and would prevent any other foreign loans from being
"raised in Great Britain, except by Governments of known good
"faith and of ascertained solvency. But, nevertheless, it might
"happen that the loss occasioned to British subjects by the non-
"payment of interest upon loans made by them to foreign Govern-
"ments might become so great that it would be too high a price for
"the nation to pay for such a warning as to the future, and in such
"a state of things it might become the duty of the British Govern-
"ment to make these matters the subject of diplomatic negotia-
"tion.

"In any conversation which you may hereafter hold with the
"Ministers upon this subject, you will not fail to communicate to
"them the views which Her Majesty's Government entertain there-
"upon, as set forth in this dispatch.

"I am, &c., PALMERSTON."

In June, 1847, Lord George Bentinck brought forward a motion in the House of Commons, "That an Address be presented to Her "Majesty, humbly praying that Her Majesty may be graciously "pleased to take such steps as may be deemed advisable to secure "for the British holders of unpaid foreign bonds redress from the "respective Governments."

In replying to Lord G. Bentinck, Lord Palmerston said: "Although "I entreat the House, upon grounds of public policy, not to impose "at present upon Her Majesty's Government the obligation which "the proposed Address would throw upon them, yet I would take "this opportunity of warning foreign Governments who are debtors "to British subjects, that the time may come when this House will "no longer sit patient under the wrongs and injustice inflicted upon "the subjects of this country. I would warn them that the time "may come when the British nation will not see with tranquillity "the sum of £150,000,000 due to British subjects and the interest "not paid; and I would warn them that, if they do not make proper "efforts adequately to fulfil their engagements, the Government of "this country, whatever man may be in office, may be compelled by "the force of public opinion and by the votes of Parliament, to "depart from that which has hitherto been the established practice "of England, and to insist upon the payment of debts due to "British subjects. That we have the means of enforcing the rights "of British subjects I am not prepared to dispute. It is not because "we are afraid of those States, or all of them put together, that we "have refrained from taking the steps to which my noble friend "(Lord G. Bentinck) would urge us. England, I trust, will always "have the means of obtaining justice for its subjects from any "country upon the face of the earth. But this is a question of ex-"pediency, and not a question of power; therefore, let no foreign "country who has done wrong to British subjects deceive itself by "a false impression, either that the British nation or the British "Parliament will for ever remain patient acquiescents in the wrong, "or that, if called upon to enforce the rights of the people of Eng-"land, the Government of England will not have ample means at "its command to obtain justice for them." [Hansard, Parl. Deb., 1847.]

VI. The obligation of the State debtor is, if possible, yet stronger when the debt has been guaranteed by Treaty [*e. g.*, as in the case of Greece. See Convention of 30th April, 1833, art. xii., De M. et De C. i., iv., p. 340]. For in that case, the foreign may be entitled to a preference over the domestic creditor.

As a general rule, the proposition of Mertens seems correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State.

VII. It may indeed happen, as the same author most justly observes, that the debtor State may adopt measures of domestic finances, so fraudulent and iniquitous, so evidently repugnant to the first principles of justice, with so manifest an intention of defeating

the claims of its creditors, as to authorize the Government of the creditor in having recourse to measures of retaliation, reprisals, or to open war—such measures, for instance, as the *permanent* depreciation of coin or paper money, or the absolute repudiation of debts contracted on the public faith of the country.

The epithet *permanent* is used, because it could scarcely be denied that, in case of extraordinary necessity [see also case mentioned by Vattel, l. ii. c. xii., s. 170], a nation might adopt temporary measures of finance with regard to its paper money, of which the foreign creditor could not justly complain.

But then he has a right to the observance of two conditions:—1. That the real value of the loan be eventually paid; 2. That he be placed during the *interim* on the same footing as the domestic creditor.

VIII. The French Government, during the last war between England and France, confiscated a debt due from a French to a British subject; subsequently an indemnity was stipulated for on the part of the French government. When the matter was brought before the commissioners appointed to adjust claims of this description, a question of great importance arose, namely, whether the debt was to be calculated according to the value of the currency at the time when the confiscation took place; or there having been subsequently to the time of this confiscation a great depreciation in the French currency, whether the value should be calculated in the depreciated currency. The commissioners held that the debt ought to be calculated according to the value at the time of the confiscation. The Privy Council, on appeal, confirmed their decree, (see the authorities on this subject collected, Story on Conflict of Laws, ss. 308–318; et vide post, *Comity*). Sir William Grant, one of the greatest judges ever known in England, in delivering his judgement, observed that this case have no analogy to the case between a debtor and and creditor, whatever might be the law, (Vide ante, vol. i, chap. viii) in a case where a depreciation of currency happened between the time when the debt was contracted and when it was paid; for he said: "There is a wrong act done by the French government; then they "are to undo that wrong act, and to put the party in the same situ- "ation as if they had never done it. * * * * It is not merely "the case of a debtor paying a debt at the day it falls due; but it is "the case of a wrong-doer who must undo, and completely undo the "wrongful act he has done; and if he received the *assignats* at the "value of 50d., he does not make compensation by returning an "*assignat* which is only worth 20d;—he must make up the difference "between the value of the assignat at different periods." (Pilkington v. Commissioners, &c., 2, Knapp's Privy Council Reports, pp. 17–21.)

In fact, the creditor is entitled to a *restitutio in integrum*.

IX. It is a clear maxim of International Law, that the property of the subject is liable for the debts contracted by the State of which he is a member. This proposition is discussed with learning and excellent sense by Grotius. After saying that—"Mero naturæ jure ex facto

"alieno nemo tenetur nisi qui bonorum successor est;" and citing some remarkable passages from Seneca: "*Si quis patriæ meæ pecuniam "credat, non dicam me illius debitorem, nec hoc æs alienum profitebor; "ad exsolvendum tamen hoc portionem meam dabo; unus e popu- "lo non tanquam pro me solvam, sed tanquam pro patriâ conferam. "Singuli debebunt non tanquam proprium, sed tanquam publici par- "tem [De J. B. et P. c. iii. c. ii. ss. 1, 2]"; and after observing that by the Roman Law the debts of the "*universitas*," or corporate body, were on failure of the funds of the "*universitas*" binding upon individuals, "non (quâ) singuli, sed quâ pars sunt universo- "rum;" and that the whole tenor of the later provisions of that law were adverse to the principle of hypothecating one man's property for another's debts, even for public debts; he adds in admirable language:

"Hæc quanquam vera sunt, tamen jure gentium voluntario induci "potuit, et inductum apparet, ut pro eo quod debet præstare civilis "aliqua societas, aut ejus caput, sive per se primo, sive quod alieno- "debito jus non reddendo, se quoque obstrinxerit, pro eo teneantur "et obligata sint bona omnia corporalia et incorporalia eorum qui "tali societati aut capiti subsunt. Expressit autem hoc quædam "necessitas, quod alioqui magna daretur injuriis faciendis licentia, "cum bona imperantium sæpe non tam facile possint in manus "venire, quam privatorum qui plures sunt. Est igitur hoc inter "jura illa quæ Justinianus ait, usu exigente, et humanis neces- "sitatibus, a gentibus humanis constituta."

VOL. III.

CHAPTER. I.

INTERNATIONAL RIGHT OF ACTION.

I. We have hitherto considered States in their *normal*, that is, their *pacific* relations to each other. We have inquired into the origin and character of their reciprocal *rights* and *obligations*. We have now to consider the *abnormal* state of things which ensues upon a disturbance of these normal relations, when these rights have been invaded and these obligations not fulfilled.

In the case of individuals, a redress for this infringement of right and neglect of obligation, is provided for in every system of National or municipal law. In these systems the individual is furnished with a *Right of Action*, and the regulation of this right, in all its various shapes, forms the subject of a *Code of Procedure*; whether there be, as in the case of most continental States, such a code made by express enactment part of a general code of law, or whether, as in England, such a code *practically* exists in usage and judicial precedent amended and amplified by positive statute.

In the system of international law, this civil right of action becomes of necessity an appeal to arms, for war is the terrible litigation of states.

By what rules this International Right of Action is governed, both with respect to the *principals* in the suit and to the *bystanders*, we shall presently consider at length.

II. But as we approach these awful confines, we must remember that it is the bounden and most sacred duty of every State, to exhaust every legal means of redress, before it has recourse to the dreadful necessity of war. These means are, as we have already seen, classed under two heads, viz:—

1. Measures taken *viâ amicabili.*

2. Measures taken *viâ facti*, which nevertheless fall short of war.

III. Measures taken *viâ amicabili* are, 1st Negotiation, 2d Arbitration.

* * * * * * *

VII. If negotiation and arbitration fail, there remain certain measures to be taken *viâ facti*, which yet fall short of open war. There are certain means of redress which, though tinged with a hostile character, and though often but the train which waits only a spark to be kindled into the full blaze of open war, are, nevertheless not in themselves inconsistent with the maintenance of peace.

REPRISAL.

XVI. A question arises at whose instance are Letters of Reprisal granted. Must the grantee be a natural born subject? Valin says that they may be granted to naturalized as well as to natural subjects. Bynhershock speaks of these letters being granted "*ob injuriam suis subditis illatam;*" but he probably did not intend to limit the meaning of the term "subditi" to natural born subjects. * * * * The ownership of goods so taken, that is, taken by reprisal, is according to International Law *ipso facto* acquired to this extent, namely, so far as necessary to satisfy the original debt which caused, and the expenses incurred by the reprisal. The residue is to be returned to the Government of the subjects against whom the reprisals have been put in force.

* * * * * * *

XXI. It remains to consider what has been the practice of nations with respect to the exercise of this right of reprisals in some memorable instances.

[A Reprisal was issued by Cromwell against France for seizing and confiscating an English merchant vessel. In 1778 Louis XVI. granted Letters of Reprisal against England for eleven vessels taken belonging to Bordeaux merchants. In 1840, the British Government issued Letters of Reprisal against the Kingdom of the Two Sicilies, because that country had granted a monopoly in sulphur, to the detriment of British subjects. In 1850 England issued Letters of Reprisal against Greece, for injuries inflicted upon British subjects.]

* * * * * * * *

Now the real question of International Law at issue in this case was, whether the state of the Greek tribunals was such as to warrant the English Foreign Minister in insisting upon M. Pacifico's demand being satisfied by the Greek Government before that person had exhausted the legal remedies which, it must be presumed, are offered by the ordinary legal tribunals of every civilized state. * * * No country has better understood both the theory and practice of reprisals than the United States of North America. [Referring to

Message of President Jackson in 1834, recommending reprisals against France for not paying the amount agreed to be paid for claims of American citizens.]

* * * * * * * *

XXIV. There is a mode of address known to International Law, which stands, as it were, midway between reprisals and war, and which is known by the name of embargo.

Appendix C.

In Lawrence's Wheaton, ed. of 1863, vol. 2, p. 505, is a discussion of the same general subject, as that discussed in the extracts from Phillimore, and on page 159 is a note containing this passage:

"It was early suggested by the American Secretary of State, that in order to prevent all apology for the expedition against Mexico, the necessary means for meeting the interest of the foreign debt should be provided by the United States till Mexico could resume the payment of it. The adverse views of the Senate on this point were not known before the proposition was declared unacceptable at London, as well as at Paris and Madrid. M. Thouvenel said, 'it might not be possible to prevent the United States offering money to Mexico, or to prevent Mexico receiving money from the United States, but neither England nor France ought in any way to recognize the transaction.'—Earl Cowley to Earl Russell, September 24, 1861. Lord Russell told Mr. Adams 'that their demands embraced not only the payment of interest on a debt which might be settled by naming a fixed sum, not more or less, but also comprehended satisfact on for the injuries done to British subjects; that England could hardly transfer those obligations to the United States.'—Earl Russell to Earl Cowley, September 27, 1861."

Appendix D.

Brief Abstract of the English Statute respecting the Petition of Right, 23d and 24th Victoria.

CHAP. XXXIV.

An Act to amend the law relating to Petitions of Right, to simplify the proceedings, and to make provisions for the costs thereof.

Petition to be entitled in "One of the Superior Courts of Common Law or Equity at Westminster," and "addressed to Her Majesty."

Petition to be left with Secretary of Home Department for Her Majesty's fiat.

Petition then taken to Solicitor of the Treasury.

Provisions as to time of serving paper.

Proceedings conformed so far as possible to those in ordinary suits at law or in equity.

Decrees or judgments may be entered on default.

Decree or judgment to show that suppliant is, or is not, entitled to such and such relief.

Costs recoverable against, and in favor of, any party to the suit.

Decree or judgment in favor of suppliant, to be certified either to Treasury or to Treasurer of the Household.

Provisions directing what property shall be taken to satisfy the judgment and costs.

Power given to certain judges to make various rules and regulations.

XVIII.—"Nothing in this Act contained shall prevent any suppliant from proceeding as before the passing of this Act."

May one State implead another in the Supreme Court of the United States to recover upon a repudiated obligation of the defendant State?

United States Supreme Court.

THE STATE OF NEW YORK

versus

THE STATE OF LOUISIANA AND OTHERS.

ARGUMENT

OF

LESLIE W. RUSSELL, Attorney-General of New York,

Before the Supreme Court, April 18, 1882.

New York:
EVENING POST JOB PRINTING OFFICE, COR. BROADWAY AND FULTON STREET.
(Law Telephone No. 541.)

1882.

ARGUMENT

OF

LESLIE W. RUSSELL,

Attorney-General of New York,

BEFORE THE

SUPREME COURT OF THE UNITED STATES, APRIL 18, 1882.

Mr. RUSSELL: *May it please the Court:*

The case which I have the honor to present to this court comes up by original bill of complaint filed by the State of New York against the State of Louisiana and her officers, for the purpose of ascertaining whether the State of New York, as the assignee and the trustee of her citizens, may maintain an action in this court for the purpose of compelling the State of Louisiana, or her officers, to pay the bonds of that State which have been issued upon the solemn faith of the State of Louisiana, and are now held by holders who are citizens of the plaintiff State. And while I recognize with all its force the old Roman maxim, "*dura lex, sed lex*," I still trust, that if the provision of the Constitution which we invoke in this case is broad enough in its verbiage to cover the remedy which we seek, that provision will receive a most beneficent construction.

The bill of complaint was filed by the State of New York, signed by the Attorney-General of that State, and verified, setting forth that in 1874, the State of Louisiana

owed upwards of $25,000,000 upon bonds of the State which had been issued partly during the insurrection and partly before, a portion of which bonds were contested by the State as fraudulent. That for the purpose of compromising her indebtedness, and for the purpose of certifying to the world that she was willing to pay such portions of that indebtedness as she recognized as lawful, the State of Louisiana, by an act, No. 3, of the year 1874, authorized the issuing of consolidated bonds. Those bonds were to be issued not to exceed sixty per cent. of the amount of the indebtedness, and were to be delivered to the holders of prior bonds of the State of Louisiana to the amount of sixty cents on the dollar upon the surrender of the old bonds. It was further provided in the Act of 1874, as a further guaranty of good faith to those persons who might accept the proffered terms of the State, that a tax of five and half mills upon the assessable property of the State of Louisiana should be annually levied and collected during the whole pendency of the bonds, and should be devoted expressly to the purpose of paying the coupons of the bonds as they matured, and of providing for the payment of those bonds at maturity. It was further provided in this Act of Louisiana, that the courts of that State should have no power to enjoin the collection of that tax, and that all of the remedies which are customary to the law should be at the disposal of the holders of the bonds for the purpose of enforcing their rights. It was further provided that the terms of this act, of this proffer by the Legislature on behalf of the State of Louisiana, should be and constitute a contract with every separate and individual holder of the old bonds who should come in under the terms of this act. It was further provided that the Act should be submitted to the people of Louisiana, and upon the submission of it to the people of Louisiana, it was ratified by the people and became a part of her Constitution.

According to the provisions of this Act, bonds were issued to the amount of $12,000,000, and old bonds to the amount of upwards of $18,000,000 were surrendered by the holders, and the new bonds, bearing seven per cent. interest, were received by the holders of the old bonds. These new bonds were what is denominated as negotiable State bonds, and contained a statement of the various provisions of the law which made the new contract between the State of Louisiana and the holders. Many of these bonds were issued to the citizens of the State of New York, who held a large portion of the old bonds, and a large amount of these new bonds are now held by the citizens of the State of New York.

This action is brought on behalf of the State of New York, upon a holding of some thirty coupons of $35 each, which were assigned to the State of New York, under the provisions of an act of the Legislature of that State, passed in the year 1880, by which it was permitted that the holders of the bonds should assign their coupons to the State, and allowing the State to seek such remedy as might be determined for the enforcement of their payment.

The taxes, in pursuance of this Law of 1874, were duly levied up to the year 1879, and I assume that the interest coupons were paid up to that year. In the year 1879, the coupons were not paid. I understand from my associate that the taxes proved to be insufficient, but they were paid up to the year 1879.

It is also averred in the bill of complaint that in the year 1879 the Legislature of Louisiana authorized the summoning of another constitutional convention, and that constitutional convention of 1879 adopted what is called the debt ordinance. By that debt ordinance the consolidated bonds of Louisiana are repudiated in part, or as the act, I believe, expresses it, and as it is expressed by counsel in his points, the debtor remits a portion of his indebtedness to his

creditors. A new proffer is made under the provisions of the Constitution, that if the holders of these bonds see fit to go to the State of Louisiana and accept new bonds at the rate of seventy-five cents on the dollar, bearing interest at the rate of four per cent. per annum, or, if they see fit to have the consolidated bonds held by them stamped with the proviso that they are to bear interest for five years at the rate of two per cent., for the next fifteen years at the rate of three per cent., and thereafter, until the maturity of the bonds, at the rate of four per cent., the State of Louisiana will negotiate these new bonds in place and in lieu of the consolidated bonds, and, inferentially, will pay these bonds at maturity and according to the new agreement. By section 209 of the new Constitution of 1879, it was provided that the entire State tax for State purposes should be reduced to six mills; and, as this court will perceive that the tax to be levied by the old Constitution of 1874 for the purpose of paying these bonds was five and a half mills on the dollar, the new tax of six mills on the dollar would be entirely insufficient to pay the consolidated bonds issued under the Act of 1874, and pay the other portions of the State debt and the State expenses.

It is further averred in our bill that moneys are yet being collected virtually under the provisions of the old Constitution, and that there is now the sum of $235,103.08 on hand, which is or may be properly devoted (in case the provisions of the new Constitution of 1879 are held invalid as impairing the obligation of the contract), to the payment of the interest coupons on the consolidated bonds of 1874.

It is further averred that taxes are being collected day by day, and that the State of Louisiana refuses, and the officers of Louisiana, who have been joined in the bill of complaint, refuse to pay or devote any portion of the taxes which were collected subsequent to 1879 to the payment of

the interest which matured on the consolidated bonds of 1874.

It is claimed by the defendants, the officers of Louisiana, that they hold the moneys on hand now entirely under the provisions of the Act of 1879, by which they are forbidden to devote any of the moneys on hand to the payment of any of these consolidated bonds, or the interest accruing upon them, and, therefore, unless they are justified by the Constitution of 1879 in refusing to devote this money, which was solemnly dedicated by the Constitution of 1874 to this purpose, there is no defense whatever for these defendants.

The prayer of the complaint is:

First.—For judgment establishing the rights of the holders of the consolidated bonds issued under the Constitution of 1874;

Second.—An injunction against the officers of Louisiana from disposing of or diverting the money which is now on hand from the object to which it should be applied; and

Third.—That the proper officers of Louisiana should be directed, if the money be insufficient, to go on and levy the taxes and appropriate the money for the purpose of paying the coupons in full.

Now, as I understand the answer which is interposed to our bill of complaint, there is no substantial denial of any of the allegations of the bill; or, in other words, the State of Louisiana comes into this court, not contesting the fact that she has made a solemn contract and a promise with her former creditors by which she justly and fairly owes to them the entire amount of this $12,000,000 of bonds, and that she has failed to meet her obligation in the payment of interest, but averring that this court has no power whatever

to either compel her or the officers of this State to redeem the promise which she made, or to fulfill their official duties in the payment of the moneys which we claim were sacredly devoted to the payment of these bonds. The State of Louisiana comes into court and answers, first, that she denies that she was advised that there was any controversy whatever between her and the State of New York. She avers that the Act of New York of 1880, of which she annexes a copy to her answer, was designed for the purpose of interposing in this court a colorable or simulated litigation for the benefit of the holders of the consolidated bonds of 1874. She denies that New York has any right to delegate the use of her name for any such purpose. She claims immunity as a sovereign State from any suit brought upon contract against her, whether it be brought by the State of New York as the actual holder of the bonds, or whether it be brought by the State of New York as the assignee and trustee of her citizens. She avers that the money which is in the hands of the fiscal agent and her officers they have no right to dispose of; and she claims the benefit of a demurrer and of want of equity for the filing of this bill.

The State of Louisiana and the defendants in our bill also file a cross-bill in which they seek to ascertain the real purpose of the action and to elicit the fact that New York has presented this claim as the assignee and trustee of her citizens who have assigned to her these coupons under the law of 1880, and that, in fact, she has no beneficial interest. Accordingly an answer was interposed to the cross-bill on behalf of the State of New York by the Governor and the Attorney-General, and by one of the solicitors who was joined in the cross-bill, in which the purpose is wholly avowed; and upon that purpose we stand here and contend that it is the right of the State of New York, under the provisions of this Constitution of the United States, to come into this court as the assignee and trustee of her citizens

holding bonds of the State of Louisiana which have been repudiated, and enforce those demands in this court, if not against the State herself, as against the fiscal agents of that State.

For convenience in the argument of this case, we have reduced the propositions which we submit to the court to five distinct propositions of law.

The first one which will be argued is: Can a State of the Union implead another State in this court for a money demand?

Second.—Can she do so when the demand has been assigned to her by one of her citizens for the purpose of the suit?

Third.—Can she do so as the sovereign and trustee of the citizen without an assignment of his demand?

Fourth.—If a suit against the State herself cannot be maintained in the cases supposed, could the officers of the State of Louisiana, under the circumstances of this case, be required by the judgment of this court to apply the money in their hands to the payment of interest on the bonds?

Fifth.—And if the money on hand be insufficient to pay the interest now due, can the officers be furthermore directed to go on in the execution of their official duties and assess and collect the taxes, required by the Constitution and laws of 1874, and pay the arrears of interest out of the same?

Justice MILLER: Is this a suit brought in this court originally?

Mr. RUSSELL: It is an original bill, filed in this court against the State of Louisiana and her officers. The jurisdiction of this court must depend upon the construction to

be given to that clause of the Constitution which allows this court to entertain originally a eontroversy between different States.

As I understand the ruling of this court, although upon common law questions it will follow the decisions of the highert court of the State from which a writ of error may be taken, yet where those decisions are in favor of the validity of a law, which this court says may impair the obligation of a contract, this court will not follow the decision of the higher appellate court of a State.

Now, I submit, in the first place, if it please your Honors, without reference to the interest which the State of New York has in this controversy, that it is an unquestioned rule of law, or ought to be unquestioned, that one State may implead another State in this court on a money demand; and I see no other way whatever for the protection of a State, which possibly, owing a debt of her own, may, for the purpose of providing for the payment of that debt at maturity, obtain a sinking fund year by year, composed largely of the promises to pay of the sister States of the Union, upon which that State may rely for the payment of her debt. Every State of this Union, nearly, has provided for a sinking fund. That sinking fund sometimes is composed largely of the stock or the bonds of another State of this Union, and in case that other State should refuse to redeem her obligations to pay, what redress has the State which has relied upon the obligations of her sister State, if she may not go into this Court for the purpose of enforcing payment? There are the bonds which have been issued. There is the purchaser. The bonds have been put into the Treasury of the State, and if the demands which she seeks to enforce under those bonds, be not a *controversy* under the provisions of the Constitution, then I am unable to determine the meaning of that word, as used; and, in fact, this question has been substantially decided by this court as ap-

plicable to the meaning of the term "controversy" as used in the Constitution. The language of the Constitution is this: "The judicial power shall extend to controversies in "which the United States shall be a party, to controversies "between two or more States, between a State and the "citizens of another State, between citizens of different "States, between citizens of the same State, claiming under "grants of different States."

Your Honors will perceive in judging of the scope of this language of the Constitution that the term "controversy" is used in the Constitution in the same sense where it applies to controversies between two or more States, as it is used where it applies to a controversy between citizens of different States and between a State and the citizens of another State. And early in the history of the jurisprudence of this country was the question determined as to the right of the citizen of one State to sue a State of the Union in the Supreme Court of the United States; I refer to the case, which, of course, is well known to all of your honors, of *Chisholm against the State of Georgia.* In that case, the plaintiff, Chisholm, sought to obtain from the Supreme Court original process to implead the State of Georgia upon a money action of *assumpsit.* The case came before the Supreme Court of the United States at the time when Judge Jay was the Chief Justice, and the bench that heard the argument was composed of five justices. Four of those justices wrote opinions, and four out of the five held that, under the original clause of the Constitution, the plaintiff had a right to his process against the sovereign State of Georgia; it was held that the language of the Constitution, which says that the judicial power of the United States shall extend to a controversy between a State and the citizens of another State, was not limited to an action which might be begun by the State herself as plaintiff against a private citizen as defendant. There was only one dissent-

ing opinion in that case, the opinion of Mr. Justice Iredell; and that case of *Chisholm against Georgia*, so far as it is applicable, has always been substantially followed by this court, as I believe, ever since. It was the decision of *Chisholm agst. Georgia*, undoubtedly, that led to the 11th amendment of the Constitution, which provided that the judicial power of the United States should not extend to a controversy on behalf of a citizen, as plaintiff, as against a State as defendant.

Justice GRAY: Mr. Russell, can you refer to any subsequent cases which have approved of this decision?

Mr. RUSSELL: Well, I do not know, but, perhaps, an affirmative answer would be an over-statement. I should state rather that the case of *Chisholm agst. Georgia*, in any of its sequences, has never been overruled. That would be perhaps a more correct statement; and I think your Honors will find, in referring to this case and the opinions of the Supreme Court in reference to kindred subjects, that the case of Chisholm agst. Georgia, has always been cited approvingly; and I might cite right here in answer to the remark of his honor, Justice Gray, that in the case of Rhode Island agst. Massachusetts, reported in 12 Peters, the opinion of the court goes to the length of saying that no class of controversies between States is excepted by the provisions of the Constitution, or, in other words, that the term "controversy" applies to every class of controversies which may be conceived of between one State and another. I also refer your Honors to one more eminent authority. That is the authority of the late Justice Curtis. In his law lectures to the students of Harvard College, in 1872, he speaks distinctly of the jurisdiction of the Supreme Court of the United States as applied to the question under consideration, and he lays it down as a maxim that the Supreme Court of the United States has jurisdiction of any contro-

versy whatever between one of the States of this Union and another.

I observe that our distinguished opponent, in criticising this section of the Constitution, states that this language of the Constitution would not refer to the case of a money demand, because a money demand upon contract was not the subject of juridical relations; or, in other words, that the contract of a State cannot be brought into question in any controversy in this court where the question to be considered is as to the force and binding effect of the obligation of the State; or, to reduce it still further, that the only reliance which the holder of an obligation of the State can possibly have upon the performance of the obligation of the State, is the reliance upon the honor of the State. Now, I think the learned counsel has fallen into error in so stating, and, beside the suggestion of what Louisiana evidently thought by her reference to judicial rights in the Act, I refer your Honors to two cases: First, the case ot Green *agst.* Biddle, 8 Wheat., 2; and Second: The case of the Board of Liquidation *agst.* McComb, 2 Otto, 531.

In the case of Green *agst.* Biddle, it was distinctly held—unanimously, I think—by the Supreme Court of the United States, that it would construe and give force to a contract which was made between the States of Virginia and Kentucky, viz., the contract of 1789, by which Kentucky separated from Virginia, and was thereafter made a State herself. It was decided that this Court would expressly adjudge as to the effect of that compact, as it bound both of the States. And it was further decided that that compact was ratified between the States of Kentucky and Virginia by Congress by the act admitting Kentucky into the Union.

In the case of the Board of Liquidation *agst.* McComb, in which the provisions of this Act of 1874 were passed upon, it was held by this court that a private citizen, the holder of some of the bonds which were issued by Louisiana

in pursuance of this Act of 1874, had a standing in court to prevent the fiscal agent, the Board of Liquidation, from issuing one dollar of those consolidated bonds to a person claiming to be a creditor of the State, and not being a holder of one of the old bonds, which it was desired to take up. This Court went to the length of saying, notwithstanding the Law of Louisiana: You shall not, because it is an impairment of the obligations of the contract—you shall not add to the debt evidenced by the consolidated bonds of Louisiana, issued under the Act of 1874, by diverting one dollar of those bonds from the purposes to which they were solemnly pledged by the vote of the people.

The learned counsel of Louisiana says, that the State of New York refuses to permit private citizens to sue her, and that Louisiana would have no power to enforce an obligation against her. This, of course, is no answer to our position; but the counsel is mistaken. The State of New York, if it please your Honors, has preferred to rely upon the justice of her cause rather than her immunity from suit; and the State of Louisiana, or even Sambo or John Chinaman, may come before the courts of New York and enforce a money obligation against the State; if any act of the State of New York interferes with the obligation of her contract, that question may be brought before the United States Supreme Court for final solution. I will cite one precedent, though perhaps the question is not very important. The State of New York contracted to build a reformatory, and, finding that it was an extravagant contract, superseded the building commissioners, appointed a superintendent, and directed a reletting of the contract. The old contractor came before the State Board of Audit and claimed that this was a breach of the Constitution of the United States, which said that no State shall impair the obligation of a contract, and the courts of New York awarded $65,000, as against the State of New York, to that contractor, for antici-

pated profits that he might have made from the contract. That is the way in which the State of New York performs its obligations to private citizens.

I pass to the consideration of the second point: can one State implead another where the demand is assigned for the purpose of collection?

Now, it cannot be contested that the State has the right to become the purchaser of any kind of security she may choose. It cannot be contested that a State has the right to buy a bond of a sister State. The power of the State to contract is unlimited; and, if she may become the holder of an obligation of a sister State, of course, she may enforce her remedy. Her right to recover upon that obligation is the same as if the bond were issued directly from the other State to a foreign power. These bonds of Louisiana were issued for the purpose of being sold. They were issued to take up the old bonds; and the State of Louisiana knew perfectly well, at the time she issued her consolidated bonds of 1874, that they might be transferred from hand to hand as other bonds; there is no inhibition, express or implied, which would prevent the State of New York from becoming the purchaser of those bonds; and it will also be observed in reference to the State of Louisiana herself, that the old common law rule, that a chose in action could not be assigned, was never applicable in that State, which was governed by the civil law; according to the law of Louisiana, it was always the case that the assignee of a chose in action, the holder of an equitable title might maintain his action directly, and he did not have to sue in the name of his assignor. We say further, that, granted that the State has the right to be a holder of these bonds, has a right to purchase them in the market the same as any other purchaser, has a right to enforce a remedy as a *bona fide* holder and purchaser, it is no matter to Louisiana if the State of New York obtained them by assignment for col-

lection. It is sufficient for her that she owes the bonds, and it is immaterial, so far as New York is concerned, by what title they are held or for whose benefit or for whose interest. The question, as I understand it, for this Court to solve in determining whether a State is properly a party to a controversy, is whether the State herself is a party to the record, and, according to a long line of decisions, this Court has held that it is immaterial whose is the substantial interest behind the controversy. The question is, Who is the party to the controversy? Is the State sued by name? If she is, then she may plead her immunity as against a suit brought by a citizen of another State. If she is not the nominal party to the record, it is immaterial whether her substantial interest lies behind the suit or not. In the case of the Bank of the Commonwealth of Kentucky *agst.* Wister, reported in 2 Peters, 318, the pleading of the Bank of the Commonwealth was that the State of Kentucky was the owner of the bank and was the substantial party in interest, and that the maintenance of the action against her was a violation of the 11th amendment to the Constitution, which provided that a citizen might not sue a State of the Union; but the Supreme Court of the United States held that though the State owned every dollar of the bank, though the State was the sole stockholder, still the question was, Who is the named party to the record? and not, Whose is the substantial interest behind the record? And so, in the case of Osborn *agst.* The United States Bank, 9 Wheat., a case which, it seems to me, decides this branch of my argument from the logical consequences which flow from that decision, the State of Ohio had taxed the Bank of the United States, had collected the sum of $98,000, and had covered that sum into the Treasury. The Supreme Court of the United States held, however, that this act was a violation of the charter of the United States Bank, and it allowed an injunction, requiring the Treasurer of the State of Ohio to

pay back that $98,000 out of the Treasury of the State of Ohio; and the Supreme Court held that, although the Treasury of the State was depleted to the extent of $98,000, still the action was maintainable, as the State was not a nominal party to the record. I also cite your Honors upon this to the Life and Writings of Justice Curtis, who has had occasion to consider this question. In the first volume, pp. 281 and 284, will be found his views. It was claimed that a certain tribe of Indians, residing in Canada, had a legal demand for annuities against the State of New York. The question was submitted to Justice Curtis, as to whether this tribe of Indians might maintain an action in the Supreme Court of the United States against the State of New York. He decided no; that it was not such a foreign power as came within the terms of the Constitution; but he advised that the annuities might be assigned to the Queen of Great Britain, and she might maintain an action in the Supreme Court of the United States for their enforcement against the State of New York. And, again, at volume 2 of Curtis' Life and Writings, pp. 145–148, your Honor will find that portion of an article by him upon State debts, which was published in the *North American Review* in 1844, in which he speaks of this very question, and after a review of the decisions and a careful consideration of the subject, he comes to the conclusion that the citizens of a foreign country might assign any claim which those citizens held against any State of the Union to the Power of which they were subjects, and that Power might maintain an action in the Supreme Court to recover the sum in controversy. That article in the *North American Review* obtained the endorsement of Mr. Justice Story in a letter which he wrote to Justice Curtis endorsing his views, and this letter will also be found at page 102 of the second volume of Curtis' Life and Writings. So that I say, first, it is not allowable to attack the legality of the assignment which may be made by the citizen of the State to

the State for the purpose of destroying that legality, even though the matter in controversy be the obligations of other States. And, secondly, I claim that, if the motive of the State may be attacked, then it will be found that the action of New York on the subject is eminently just and proper; and this brings me to the consideration of the third point, which is, can the State of New York, as the sovereign and trustee of the citizen, implead the State of Louisiana in this Court without an assignment of the demand of her citizen?

Justice FIELD: The original Constitution authorized a suit by a citizen of one State against another State. The amendment strikes out the right of a citizen of another State to bring the action. Now, has not the amendment accomplished that, even though the citizen makes the assignment?

Mr. RUSSELL: I think not, and for this reason, that it is simply, as I understand it from the history of this country, simply a question of fastidiousness, or, in other words, when a State is called at the forum of justice, she must there meet with an opponent of equal dignity and power, in order to compel her to answer; and I think, if your Honor will recall the current history of the times when this amendment was adopted and the original Constitution was adopted, that your Honor will see that this was the precise reason why the States of the Union desired the amendment; that it is not becoming to the dignity of a State of this Union to allow herself to be brought into a tribunal of justice by a citizen.

Justice BRADLEY: You say that as the Constitution originally stood, this court had jurisdiction of all controversies between States and between citizens of one State and another State. You then say the Constitution intended to change that. What was the purpose of that? Was it to

leave the States liable to be sued by proxy, by substituting a trustee?

Mr. RUSSELL: It is, of course, for your Honors to decide what was meant by the adoption of the 11th Amendment of the Constitution, and if that amendment went to the effect of establishing the rule that the State herself, which, as I claim, before the decision in Chisholm *vs.* Georgia, and before the amendment, might have maintained an action as the sovereign and trustee of one of her citizens upon the default of a sister State in this Court; if it went to the length of saying that the action might not be maintained by the State herself, that it was the design of that clause of the Constitution to say that no power on earth shall compel States to pay their obligations, then, of course, the inference is what our opponents draw from the adoption of the 11th Amendment to the Constitution. But I submit that there is no authority or precedent for maintaining that the 11th Amendment of the Constitution goes one single inch beyond its express terms, and that the sole reason for its adoption was, as I have indicated, that it was simply a question of dignity, and not a question of substantial right.

Justice MILLER: It has never been decided that a State could be sued upon her indebtedness, since the 11th Amendment; as I recollect, no direct precedent sustains your action.

Mr. RUSSELL: It may be well then to make a good beginning, and if your Honors are convinced that under the broad language of the Constitution, any controversy which a State of this Union sees fit to adopt in protection of her citizens against another State, is one which your Honors have the right to hear, then this Court will have gone a long ways towards making repudiation impossible. That is not a constitutional argument perhaps, but at the same time it is an argument which I venture to address to the considera-

tion of this Court, as to whether that clause of the Constitution should not have a beneficent construction.

Justice GRAY: Hamilton and Marshall, I think, and Madison, at any rate, some of the great expounders of the original Constitution took a different view originally from that which was taken in Chisholm *versus* The State of Georgia.

Mr. RUSSELL: Madison did.

Justice GRAY: But I only mention it in this aspect, whether the amendment of the Constitution was not with the view of settling the question beyond controversy that a State might not be sued by a citizen directly or indirectly.

Mr. RUSSELL: I think not. I think the 11th Amendment was adopted for the purpose of limiting what would otherwise be the effect of the term "controversy." There was no demand which a citizen might not have against a State that he could not sue upon. Now, they limited it as to the citizen by saying: if a citizen comes into the United States Court he shall not have a right of action as against the State. As to the term, "controversies between different States," it was entirely unaffected by the 11th Amendment. So in the debates in the Convention of Virginia upon the question of adopting the Federal Constitution, it was there claimed by Patrick Henry that this clause in regard to a controversy between a State and citizens of another State did apply to an action which might be brought by a citizen against a State; and that was one of the objections urged by some persons to the adoption of the Constitution.

I proceed, further, to the reasons why I think that it was proper, and is proper for the State of New York to intervene on behalf of her citizens; and this presents the question: What would have been the remedy against Louisiana if New York and Louisiana had been independent States, and whether the Constitution has provided a substitute? This branch of the controversy has this fouudation, that it

is the recognized custom of the law of nations, and was the law at the time of the adoption of the Constitution, that New York might protect her citizens even to the extent of making reprisals or issuing letters of marque; and that if the State of Louisiana and the State of New York, as sovreign States, side by side, had stood together at that time, and Louisiana had issued her bonds upon which she promised to pay the citizens of New York twenty millions, and had not paid them, that by the recognized law of nations New York had her redress by levying war and by making reprisals, while by the Constitution of the United States she has surrendered this remedy, and the question for this court to decide is, whether she has received any equivalent whatever; and to show that I do not overstate the doctrine, I shall read very briefly from authorities upon the law of nations. I refer to an old act of the English Parliament, 4 Hen. IV., chap. 7; the French Ordonance de la Marine, in which this right is expressly recognized; Vattel; Manning in his Law of Nations; Twiss, and I will make a short extract from Phillimore:

"The right of interference on the part of a State, for the purpose of enforcing the performance of justice to its citizens from a foreign State, stands upon an unquestionable foundation, when a foreign State has become itself the debtor of these citizens."

Int. Law, 2 Lon. Ed., Vol. 2, p. 8.

In another chapter, entitled "International Right of Action," he says:

"In the case of individuals a redress for this infringement of right and neglect of obligation is provided for in every system of national or municipal law. In these systems the individual is furnished with a *right of action*, and the regulation of this right, in all its various shapes, forms the subject of a code of procedure, whether there be, as in the case of most continental States, such a code made by express enact-

ment part of a general code of law, or whether, as in England, such a code practically exists in usage and judicial precedent, amended and amplified by positive statute.

"In the system of international law the civil right of action becomes, of necessity, an appeal to arms, for war is the terrible litigation of States."

We have set out upon our brief the opinion of Mr. Hamilton, which I will not undertake to read.

I also refer to various cases decided by this court, in which jurisdiction has been maintained in various forms of controversies between different States of the Union; and so I aver that the term "controversy," as used in the Constitution, was with reference to those classes of controversies for which remedies theretofore had been provided according to the law of nations. The State of New York surrendered these, and received as an equivalent the right to maintain her action before the Supreme Court of the United States.

But, passing the consideration of that question, I say that if Louisiana cannot be brought into court her officers may be, and I don't propose to argue the question as to whether this act of 1879, by the people of Louisiana, impairs the obligation of contracts, because Louisiana herself has said, in the contract by which she notified the holders of these old bonds to surrender them and receive the new bonds, that this law and these new bonds should form a contract between her and the holders. If that be so, there is nothing whatever stands in the way between the mandate of this Court and the officers and fiscal agents of Louisiana, who have the funds in hand, to prevent this court deciding and awarding process for the purpose of the payment of these various coupons which are now past due. In the case of Osborn *against* The Bank of the United States, reported in 9th Wheaton, to which I had occasion to refer, the mandate of this Court went into the treasury of the State, and it was there distinctly enunciated as a precedent to be followed that

the unconstitutionality of the law of any State should not stand as between a party who claimed a right in the Courts of the United States against the officers of the State by virtue of a law which this court pronounced unconstitutional and void. Therefore, I say that in case the State of Louisiana may not be sued in this court—may not be a party to this record by virtue of the inference to be drawn from the adoption of the 11th Amendment—that the immunity does not apply to these officers of the State of Louisiana, and that as against them New York, as the holder of these coupons, has a perfect remedy; and I submit these conclusions which seem to me are to be drawn from the precedents;

I.—The intent of the Constitution was not limited in the term "controversies" to those subjects which had in the world's jurisprudence in any sense become juridical as applied to those States, because the forum of contentions between the States was not juridical but conventional or warlike.

II.—What should be the subject of State controversies was indefinite, and, therefore, the term used was purposely expansive to substitute a peaceful for a bloody remedy—the staff of justice in every case for the sword, and the white sealed missive of the law for marques and reprisals upon commerce.

III.—Were the construction more limited, the result here would be the same. If the term was meant to apply to known controversies of States our contention is well founded, for the right of reprisal against a State for the payment of its obligations was fully recognized by the civilized nations of the earth.

IV.—The judges of this court of 1793, including one of the authors of the *Federalist*, knew the unexpressed thoughts,

motives and assumptions of the then people of the Union better than we; construing the Constitution in such a light, and witnesses of its birth, they solemnly pronounced its purpose to be the allowance of peaceful process to compel a State to pay her money debts and redeem her honor. The opposing counsel recognize that they must ask the complete overthrow of this precedent; right in reason as in justice, this honorable judgment may not be overturned without a wrench which cannot be contemplated without dismay.

V.—And when one of the States of this Union, jealous of her own honor, for the redemption of her own promises to creditors, accumulates a sinking fund of the solemn covenants of a sister State, the constitutional right of controversy with that other State is not so poor and worthless a thing as to fail in giving her the right of any suitor in a controversy to implead her debtor in the forum provided, to exhibit the defense and pronounce it insufficient, to the end that it may not by the denial of the right of controversy, supposed to be guaranteed, be forced to pass the day of payment of her own debts on account of her mistaken reliance upon the broken promise of a sovereign State.

VI.—That a right to a standing in this Court depends upon a party's occupying the position named in the Constitution, irrespective of motive; this Court will not divest itself of jurisdiction because some one else is the substantial party in interest.

I submit, and I think your Honors will find from the argument of the learned counsel for the defense, that he impliedly concedes that if the State of New York might, as the purchaser of the bonds, the *bona fide* purchaser of

the bonds of Louisiana, maintain this action, she can do so as the assignee and trustee of her citizens.

I have added, also, the following suggestions, which I deem to be established as the logical sequences of the decisions of the Supreme Court of the United States:

We find that our contention has been supported by this court, aside from the case of Chisholm *vs.* Georgia,

1st. By the holding that the constitutional clause applies or not as the State is or is not a party to the record.

2d. That the question of interest is immaterial. Though, under cover of the form of action, the State is in fact attacked, her immunity does not exist, and her treasury may be depleted by order of this Court.

3d. That process lies to compel her Governor to act or not to act; her Treasurer to pay out her funds; and, therefore, reasoning by precedents from directions to city and county officers, to require her taxing officials to levy taxes to pay debts.

4th. Hence, where her contracts are involved, her immunity from direct suit is simply a name; she may be substantially sued even by citizens, and, therefore, when that technical immunity is, by the plain words of the Constitution, inapplicable, where a State produces the obligation and complies with every requirement of inter-State delicacy and fastidiousness, direction may properly be substituted for indirection.

5th. That the courts of the United States do not hesitate to deal with the contract obligations of the States, and set aside laws hostile to their efficacy and force, in the same manner and with the same lack of hesitation whether private

suitors or the States themselves are affected; no rule of construction which would decline action where the State is nominally as well as really a party in interest is possible by logical reasoning, unless there be a positive prohibition in terms so direct as not to admit of doubt.

6th. Every decision has been favorable to a beneficial interpretation to provide a remedy for the enforcement of a right where otherwise none would exist, and, if the contention of Louisiana be justified, words of the Constitution will be narrowed beyond their ordinary and general significance to allow her to interpose as a shield the immunity of her name for the purpose of the prevention of justice.

And, lastly, I submit that those words of the Constitution should have a liberal and beneficial construction.

108-76

FILED
OCT 10 1882
A. McKENNEY, Clerk

United States Supreme Court.

THE STATE OF NEW YORK

against

THE STATE OF LOUISIANA AND OTHERS.

ARGUMENT

OF

MR. DAVID DUDLEY FIELD,

REPLYING FOR THE STATE OF NEW YORK.

DORSHEIMER, BACON & DEYO,

Solicitors for Complainant.

PRELIMINARY NOTE.

Comparing the stenographer's report of my argument with my notes and the printed brief, I found so much omitted from the former, and so much repeated from the latter, that I thought I might follow the example of my learned friend, the counsel for the defendants, and, while I omitted these repetitions, I might amplify the rest. The substance of the argument is, I think, not changed, though the form may be enlarged. This course, I trust, will be acceptable to the Court and to the counsel.

D. D. F.

United States Supreme Court,

THE STATE OF NEW YORK

against

THE STATE OF LOUISIANA AND OTHERS.

Argument of Mr. David Dudley Field, replying for the State of New York.

If the Court please:

The case has already occupied so much time, and so many topics have been gone into, and so little time remains to me, that I shall be obliged to pass rapidly, I fear, over some parts of the case, which I would have gladly discussed more fully.

The first point to be considered is the nature and scope of this suit of the state of New York which I am advocating. They are to be gathered from the record, from which I desire to show you what is the primary and what is the secondary object. You will find on pages 3 and 4, after a statement of the statute of Louisiana and the corresponding provisions of the constitution of that state, this allegation respecting the consolidated bonds of the state: That such consolidated bonds were duly executed and issued to the amount of twelve millions of dollars, or thereabouts, many of which were issued to citizens of New York, who now hold them to the amount of hundreds of thousands of dollars. Another allegation is that the plaintiff is moreover the owner and

holder of coupons from some of these bonds. Then it is shown, that Louisiana has repudiated in effect both bonds and coupons. The relief sought is a judgment, that the bonds with the coupons and the statute and constitution constituted a valid contract between the state of Louisiana and the holders, which cannot be impaired by any act of the state, that the defendants be enjoined from diverting designated funds to other purposes, and that the coupons held by New York and the bonds held by her citizens be paid as they become due.

You will perceive, then, that the state of New York comes here not merely or chiefly as the assignee of a certain number of coupons, but as sovereign and trustee for her five millions of people, many of whom have bought in her markets and now hold the obligations of the state of Louisiana, which they took upon the faith of the state. The transfer of the coupons is a mere incident of the case.

The cause is one in which New York comes to assert her claims under the law of nations, in the form provided by the constitution of the land. It is for you to determine, whether, under this constitution, New York can assert the rights which, under the old law, she had, and which she avers that she has never lost.

Who are the persons for whom she intervenes?

Mr. Campbell: Speculators.

Mr. Field: Speculators! Bloated bondholders, I expected to hear, for that is usually the language of defaulters and repudiators, who have seduced capitalists into lending them money.

The first witness examined on behalf of New York was Mr. Justice Rapallo, an eminent judge of our Court of Appeals, who invested $25,000 in the bonds of this state of Louisiana. There are other holders, —banks—that were induced to lend money on the pledge of the bonds, and have been obliged to hold them for years. This citizen and judge, with other citizens, and this bank with other banks, not speculators but investors or pledgees, ask the state,

which created the corporations and which protects its corporations and citizens alike, to intervene on their behalf, and as their guardian, trustee and sovereign, to come into this court and make the claim which can be made nowhere else, and which, if lost here is lost forever.

What are these obligations of Louisiana? Promises to pay, made with all the deliberation and solemnity with which a sovereign state can pledge her faith and bind her honor. Whether it was to feed hungering and plundering political adventurers, or to defray the expenses of public improvements, real or fancied, the state had previous to 1874 contracted —or at least there was contracted in her name and apparently by her authority—a large debt, amounting to $18,000,000. This debt she undertook to compromise. She published in the markets of New York and London, of Paris and Amsterdam, this proposal; if you will surrender your present claims, we will give you new bonds for 60 per cent. of their face, payable in forty years, bearing interest at 7 per cent., and these bonds we will fortify with all the safeguards that ingenuity can devise. We will provide machinery for levying a tax of 5½ mills on the dollar, sufficient for the payment of the bonds, principal and interest, and we will designate the officers who are to collect the tax and pay the bonds. So enacted the legislative assembly.

This was not all. The people of Louisiana in their sovereign capacity adopted a constitutional ordinance ratifying the statute and declaring, that the issue of these consolidated bonds created a valid contract between the state and every holder of the bonds, which the state should "by no means and in no wise impair;" that no court should enjoin the payment of the principal or interest or the levy or collection of the tax, and that to secure such levy, collection and payment, the judicial power should be exercised, when necessary.

This compromise proposed by Louisiana to her creditors was accepted by them, and forty per cent.

of her debt was extinguished. What then happened? What could have been expected to happen? Why, that the people of the state, grateful for the lightening of their burden by nearly half, and pleased with the confidence reposed in their honor, went on to keep their promises! Not at all.

Within five years, almost before the ink was dry upon some of these bonds, they adopted another constitutional ordinance, which proposed to *remit* the interest due the first of January, 1880, and to provide that for five years thereafter the state should pay interest at 2 per cent., for 3 years afterwards at 3 per cent., and for all the years following at 4 per cent.; or the debtors might, if they liked it better, take instead new bonds for 75 cents on the dollar, with interest at 4 per cent. —forgetting that the new bonds would be no better than the old, and that if the faith of Louisiana was not already bound, it never could be bound. Here was the *culmination* of repudiation—culmination, I say, because never before in this land has there been repudiation like it. In Mississippi the pretence was that the bonds had been fraudulently issued; in Minnesota, some other pretense; in Tennessee the same, and in Virginia the same; but that which was done in Louisiana was done without a pretence of taint in the existing obligations; it was done in a time of profound peace, without stress of poverty, without any excuse whatever.

If poverty had been the reason, the state would have said, "We will pay as much as we can at present, and the balance shall be paid at a future time." But the state is able to pay. Situate upon the banks of the Mississippi, at the entry of the sea, Louisiana might count upon a future such as few states of this Union could dream of. She holds both sides of the magnificent river, the sources of which lie in that broad valley of abundance, whose harvests surpass the harvests of the Nile. She has but to preserve her honor, and riches will come with honor.

The questions which are presented upon these pleadings and this evidence divide themselves naturally into five: First, Does your jurisdiction between states extend to money demands? Second, Does it extend to money demands assigned for the purpose of prosecution? Third, If there be no assignment, can a state as a sovereign assert in this court the rights which she would have had under the law of nations, if she had not come into the federal bond, and under that law could New York, as an independent state, have intervened for the enforcement of the claims of her citizens against Louisiana? Fourth and Fifth, If we are wrong in the arguments which we make upon the three previous questions, can officers of the state, and funds in their hands, be reached, so as to compel the specific performance of the stipulations contained in the constitution and statute of Louisiana?

THE JURISDICTION OF THIS COURT OVER CONTROVERSIES BETWEEN THE STATES, AS ESTABLISHED BY THE CONSTITUTION, EXTENDS TO EVERY CONTROVERSY, WHICH ONE STATE CAN HAVE WITH ANOTHER.

In Cohens *v.* Virginia, 6 Wheaton, 264, Chief Justice Marshall said, speaking of the Judiciary article:

> "In the second class the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State' 'and between a State and foreign States, citizens or subjects.' *If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union.*

The word "controversies" is used several times in the judiciary article, and there is no reason to suppose that it is used in different senses. Whenever it has been interpreted by the courts one signification, and one only, has been given to it. On some occasions it has been said that the word does not include questions that are purely political, but

that is because a judiciary, by its nature, entertains only judicial questions. A political question belongs to the political department of the government, as a judicial question to the judicial department. For example, the Circuit Courts have cognizance of suits by one citizen against another upon private contracts of every kind, whether for the price of land or chattels, or upon negotiable paper, but if in such suits political questions arise, the court adopts as its rule the determination of the political department, reserving to itself every question that is in its nature judicial. See the observations of Chief Justice Marshall, in Brown *v.* The United States, 8 Cranch., 110, and of Chief Justice Taney, in his dissenting opinion in Rhode Island *v.* Massachusetts, 12 Pet., 752.

A money demand may present, and generally does present, a purely judicial question. Most controversies indeed resolve themselves into demands for compensation in money. We can imagine many cases of claims for money which might be made by one state upon another. A suit could be maintained in this court by Virginia to compel West Virginia to pay her proportion of the debt contracted before the separation. There may be demands for causes other than contract—demands for injuries. The states are not prohibited from engaging in trade. They may own and keep trading ships; and if New York for the purpose of revenue should establish a merchant fleet, and one of her vessels going to New Orleans should be seized by the authorities of Louisiana and sold, and the money paid into her treasury, it could hardly be pretended that, though the individuals who made the seizure might be prosecuted for the wrong, the state of Louisiana could not be made to answer New York in this court for the proceeds of the confiscated property?

These are the conclusions to which we should come independently of judicial construction. We have, however, such a construction by this court, given when the constitution was fresh from the hands of its framers. The case of Chisholm against

Georgia gave an interpretation to the constitution which must be accepted as of unquestionable authority. No matter what Hamilton had previously said in the Federalist, no matter what Madison had said in the Convention, the judgment in Chisholm's case from the time it was delivered became the rule of this court and the law of the country. It stands now as firm as it stood when rendered. It has been respected and recognized as authority whenever it has been mentioned, in the debates of lawyers or the judgments of courts.

In the case of New Jersey *v.* New York, 5th Peters, 287, Chief Justice Marshall said:

"At the same term, the case of Chisholm's Executors *v.* The State of Georgia came on, and was argued for the plaintiffs by the then attorney-general, Mr. Randolph. The judges delivered their opinions seriatem; and those opinions bear ample testimony to the profound consideration they had bestowed on every question arising in the case. Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson and Mr. Justice Blair decided in favor of the jurisdiction of the court, and that the process served on the governor and attorney-general of the state was sufficient. Mr. Justice Iredell thought an act of Congress necessary to enable the court to exercise its jurisdiction."

And afterwards in Kentucky *v.* Dennison, 24 How., 96, Mr. Chief Justice Taney used these words:

"The court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it, and which have been raised and fully argued at the bar.

"Some of them, however, are not now for the first time brought to the attention of this court; and *the objection made to the jurisdiction*, and the form and nature of the process to be issued, and upon whom it is to be served, *have all been heretofore considered and decided, and cannot now be regarded as open to further dispute.*

"As early as 1792, in the case of Georgia *v.* Brailsford, the court exercised the original jurisdiction conferred by the constitution, without any further legislation by Congress, to regulate it, than the act of 1789. And no question was then made, nor any doubt then expressed, as to the authority of the court. The same power was again exercised without objection in the case of Oswald *v.* The State of Georgia, in which the court regulated the form and nature of the process against the state, and directed it to be served on the governor and attorney-general.

"But in the case of Chisholm's executors *v.* The State of Georgia, at February term, 1793, reported in 2 Dall., 419, the authority of the court in this respect was questioned, and brought to its attention in the argument of counsel; and the report shows how carefully and thoroughly the subject was considered. Each of the judges delivered a separate opinion, in which these questions as to the jurisdiction of the court, and the mode of exercising it, are elaborately examined.

"Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson and Mr. Justice Blair, decided in favor of the jurisdiction, and held that process served on the governor and attorney-general was sufficient. Mr. Justice Iredell differed and thought that further legislation by Congress was necessary to give the jurisdiction, and regulate the manner in which it should be exercised. *But the opinion of the majority of the court upon these points has always been since followed.* And in the case of New Jersey *v.* New York, in 1831, 5 Pet., 284, Chief Justice Marshall, in delivering the opinion of the court, refers to the case of Chisholm *v.* The State of Georgia, and to the opinions there delivered, and the judgment pronounced, in terms of high respect, and after enumerating the various cases in which that decision had been acted on, reaffirms it in the following words:"

In the case of Rhode Island *v.* Massachusetts, reported in 12 Peters, upon a motion to dismiss the bill for want of jurisdiction, the question of jurisdiction over controversies between states was again gone into. The following are extracts from the elaborate opinion of the court, as delivered by Mr. Justice Baldwin.

On page 719 he says:

"Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are *two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other, for all but federal purposes.* So they have been considered by this court through a long series of years and cases, to the present term; during which, in the case of the Bank of the United States *v.* Daniels, this court has declared this to be a fundamental principle of the constitution; and so we shall consider it in deciding on the present motion."

And again on page 721:

"That it is a controversy between two states cannot be denied; and *though the constitution does not, in terms extend the judicial power to all controversies between two or more states, yet it, in terms, excludes none, whatever may be their nature or subject.*"

Again on page 727:

"By the ninth article of confederation, adopted by the legislatures of the several states, it is provided: 'That the United States in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or which may hereafter arise between two or more states concerning boundary, jurisdiction or *any other cause whatever.*' * * * That *the constitution* which emanated directly from the people, in conventions in the several states, *could not have been intended to give to the judicial power a less extended jurisdiction,* or less efficient means of final action than the articles of confederation adopted by the mere legislative power of the states, had given to a special tribunal appointed by Congress, whose members were the mere creatures and representatives of state legislatures, appointed by them without any action by the people of the state."

Again at page 731:

"There is but one power in this union paramount to that by which, in our opinion, this jurisdiction has been granted, and must be brought into action if it can; that power has been exerted in the 11th amendment; but while it took from this court all jurisdiction, past, present and future, of all *controversies between states and individuals it left its exercise over those between states as free as it had been before.*"

And it may be well in this connection to refer to what was said in the case of the Cherokee Nation *v.* Georgia, reported in 5 Peters. An application for an injunction was refused, upon the ground, that the Cherokees were not a foreign state within the meaning of the constitution; but no doubt was expressed that a foreign state might sue one of our states in this court. The judgment was delivered by Chief Justice Marshall, and he put the question in this form:

"The third article of the constitution describes the extent of the judicial power. The second section closes the enumeration of the cases to which it is extended, with "controversies between a state and citizens thereof, and foreign states, citizens or subjects." The subsequent clause of the same section gives the Supreme Court original jurisdiction in all cases in which a state shall be a party. The party defendant may then unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state, in the sense in which that term is used in the constitution."

The conclusion being, that it was not such a foreign state, the motion for an injunction was denied.

Mr. Justice Thompson dissented upon the point whether the Cherokee nation was a foreign state. In the course of his opinion he expressed himself as follows:

"That a state of this Union may be sued by a foreign state when a proper case exists and is presented, is too plainly and expressly declared in the constitution to admit of doubt, and the first inquiry is whether the Cherokee nation is a foreign state, within the sense and meaning of the constitution."

Again:

"Although there are many cases in which one of these United States has been sued by another, I am not aware of any instance in which one of the United States has been sued by a foreign state, but *no doubt can be entertained that such an action might be sustained*, upon a proper case being presented. It is expressly provided for in the constitution and this provision is certainly not to be rejected as entirely nugatory. Suppose a state, with the consent of Congress, should enter into an agreement with a foreign power, as might undoubtedly be done (Constitution, article 1st, sec. 10), for *a loan of money, would not an action be sustained in this court to enforce payment thereof.*"

Am I not therefore warranted in answering to the first question, that, whatever else may be said of the jurisdiction of this court over controversies between states, it certainly includes demands for money.

ARE DEMANDS WHICH HAVE BEEN ASSIGNED, FOR THE PURPOSE OF INDUCING A STATE TO INTERVENE FOR THEIR RECOVERY, EXCEPTED FROM THE JURISDICTION?

Before the eleventh amendment the question could hardly have arisen. That narrow rule of the common law which forbade the assignment of claims never applied to the sovereign, even in England, and in our states it has been generally abrogated. In New York it faded away many years ago. The assignment in the present case was made in New York, and by the law of that state vested a perfect title in the assignee. This assignee could give a valid acquittance of the demand, to any person, anywhere. And if a state becomes the undoubted owner of a claim, why can it

not prosecute the same in this court? The answer which the learned counsel of the defendants gives, is that the assignee cannot sue because the assignor could not. That, however, is not an answer in other cases. For example, no person but a resident of New York can sue a foreign corporation in the courts of that state, upon certain demands, yet it is not uncommon for a resident of another state to assign such a claim against a corporation to a resident of New York, so that he may maintain the suit. In every such case the assignor was prohibited by law from suing, and that was the reason why the assignment was made. An assignment for the purpose of enabling the assignee to sue is common practice, (68 N. Y., 30, 6 Wall., 288). The provision of the Federal Judiciary Act of 1789, forbidding suits by assignees, admitted by implication the existence of the rule, and that a special provision was necessary to create an exception.

Is there anything in the reason or circumstances of the eleventh amendment which makes its construction an exception to the general rule? What was the reason and what were the circumstances? The history of the constitution, of the judgment in Chisholm's case, of the consequent amendment, and the circumstances of the times, give the answer. The states were poor; they were overburdened with debts, and they were jealous of their independence. The idea of being compelled to answer to a private citizen, before any tribunal, was foreign to their habits and galling to their pride. Their repugnance was not to being made to answer, but being made to answer private persons. This I gather from the history of the period, and from the terms of the amendment. I do not find anywhere an expression of unwillingness to answer their equals. Why, otherwise was the amendment couched in the terms in which it stands? Mark the words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity com-

menced or prosecuted against one of the United States *by citizens of any other state, or by citizens or subjects of any foreign state.*" The objections of the governor and legislature of Massachusetts were expressed in similar terms, and appear to have been aimed only at suits by *private persons.* Consider the language of the resolve of June 23, 1793, ordering copies of the case to be printed, "in which is discussed the question whether a state is liable to be sued by *a private citizen* of another state," the speech of the Governor in which he says, "I cannot conceive, that the people of this commonwealth" * * * "expected, that each state should be held liable to answer, on compulsory civil process, *to any individual* resident in another state or in a foreign kingdom." The resolve adopted on the 27th of September was aimed at the doctrine, "that a state is compellable to answer in any suit *by an individual or individuals*, in any court of the United States." The language of the Virginia resolution is to the same purport. And when this court, in Hollingsworth's case, 3 Dall., 378, delivered its opinion upon the effect of the amendment, it declared the same in these words: "that the amendment being authoritatively adopted, there could not be exercised any jurisdiction, in any case past or future, in which a state was sued by *the citizens of another state*, or by *citizens or subjects of any foreign state.*"

The judiciary article had made the jurisdiction of the Supreme Court extend "to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states; and between a state or a citizen thereof and foreign states, citizens or subjects." When this Court decided that the article conferred jurisdiction of suits by private persons against the states, the amendment was made,

but it went no further than to exclude the suits of private persons. The construction now claimed for this language is that the prohibition extends to suits by sovereigns intervening for their citizens. Is that a just construction? Why was not such an intention expressed, if it existed? It would have been easy to add these words to the amendment, as it stands: "or by any such state upon a claim derived from its citizens or subjects."

That is not a wise construction of a constitutional provision, which extends it beyond its plain meaning or evident intent. I venture to think, that not a little uncertainty in our law has arisen from the habit of making constitutions or statutes mean something different from their language. Lawyers are not seldom astute to exclude from the operation of an enactment something that is really there, or to put in something that is not there. A suit by one state acting on behalf of its citizens against another state, is not in terms prohibited. A suit by citizens themselves, is prohibited. But it is argued, that what cannot be done directly, cannot be done indirectly. The answer is that the suit of the state is not in any just sense a suit of the citizen directly or indirectly; it is the suit of the state—exercising its sovereign prerogative, which it may exercise or not in its discretion, both as to the time and extent of the exercise. The great controversy between the United States and Great Britain over the Alabama claims was prosecuted by the United States and not by the owners of the plundered ships. It could not properly be termed a prosecution by the citizens directly or indirectly, although the claims for which this government intervened were private claims, the claims of our despoiled citizens. The state may stand forward whenever it pleases, as the champion of its citizens, for the very reason that they cannot stand for themselves. If they could themselves sue, the state could not; because the reason of its intervention is the impos-

sibility of the citizens obtaining justice for themselves. When the eleventh amendment was adopted, as when the constitution was framed, the states were jealous of their rights. This jealously led to the amendment; but they did not, surely, intend thereby to give away any of their own rights; and when Massachusetts and New York proposed and obtained the amending article in support of their rights as sovereigns, they could not have dreamed of surrendering any of the rights which they held also as sovereign; and among the greatest of them all was that of intervening on behalf of their own citizens, when all other redress should fail.

The defendant's argument proves too much. It would prevent a *foreign* state from intervening for its citizens or subjects. For example, according to the settled doctrine of the law of nations Great Britain can intervene against another country on behalf of British creditors. If New York, on behalf of her citizens, cannot maintain a suit in this court against Louisiana, neither could Great Britain on behalf of hers. The consolidated bonds of Louisiana are held in London as in New York. The government of Great Britain, in cases less flagrant, has intervened to compel a foreign state to pay British creditors. Suppose it should intervene to obtain payment from Louisiana, in what form would that intervention come? If the complaint were first addressed to the executive of the United States, the answer might be, and probably would be, "the Supreme Court of the Union is open to you; try that, and if you fail there, then, and not before, come to us." Suppose then a suit brought in the name of the Queen against Louisiana, for the payment of the debts due to English bondholders, could Louisiana throw the eleventh amendment in the Queen's face, as a bar to her suit? If that could be done, this consequence might follow: the Queen could then complain to the United States of her failure to get justice from the State, call upon them as paramount in sovereignty

to pay, and should the United States pay—as they must, if they do not proclaim themselves beyond the pale of international law—could they not then turn round and sue Louisiana in this court for the money paid?

The argument would prove too much in another respect, for it would prove, that a state could not sue another state, upon a draft of its financial officer purchased for remittance or investment. A state keeps its money on deposit in banks or other depositories, and draws it out on drafts. If one of these drafts finds its way into the treasury of another state and is dishonored, cannot the latter sue the former? The state of New York disbursed twelve million dollars last year, all paid by means of drafts on banks. These drafts passed from hand to hand. Some of them, no doubt, found their way to other states, and it might well be into the treasuries of other states. Were they there worthless, because the constitution forbids a state from entering into an agreement with another state? The question would probably be answered with a smile. The remittances by the English government in payment for the Suez Canal shares were made through the Rothschilds; those which were made to us for the Alabama award were made in drafts which the British consul carried in his pocket to Washington. These were no doubt indorsed by the fiscal officers of the United States.

The fiscal officers of the states must do the same with drafts which they receive. If these should happen to be the drafts of the fiscal officers of other states, would the indorsement pass no title and create no obligation? We know that the states sometimes invest their funds in the bonds of other states. Massachusetts has at this moment a part of her funds thus invested. Her statutes make special provision for it. The following two sections are taken from her Revised Statutes (pp. 185, 186).

"Section 60. All moneys belonging to funds over which the commonwealth has exclusive control, shall be invested in securities

of the commonwealth, in the notes or bonds of the several counties, cities, and towns thereof, *or in the scrip or bonds of the several New England states, of the state of New York,* or of the United States; and said investments shall be made by the treasurer with the approval of the governor and council.

"Section 61. The governor shall annually, in the month of August, appoint a committee of the council, who shall examine into the value of the notes and securities in charge of the treasurer, and shall report thereupon to the governor and council, who may, if they find good and sufficient cause, direct the treasurer to make sale of, or to collect by due course of law, any such notes or securities over which the commonwealth has exclusive control, and to invest the proceeds according to the preceding section."

Among all the lawyers and statesmen of Massachusetts, probably not a single one has ever imagined that, by thus investing her funds, the state was making agreements with sister states in violation of the Constitution, and was loading herself with forbidden and, therefore, worthless securities; or, if the bonds were purchased, as they probably were, in the open market from Boston merchants, that, because the title was derived from such private sources, payment could not be enforced from a defaulting state.

But it is objected, by our friends on the other side, that the court will be overburdened, if this jurisdiction is maintained. What an argument to address to a court, whose sole function is to decide what the law is, not what it ought to be. The constitution was not made for the judges, but the judges for the constitution. It was not made by the courts, but by the people, for presidents, congresses and courts to execute and to obey. The consequence foretold, however, would not follow. Once let it be understood, that, though a state cannot be called to account by private citizens, it can be called to account by sister states, and there will be little occasion to interfere. Good faith will be kept so soon as it is made evident, that it can be enforced in case of need. If it be necessary, as I think it is, to lighten the burdens of the court, let some of its appellate duties be lessened. Overburdened it ever will be, so long as Congress obliges the judges to listen to evidence of

patent rights, and to consider cases on appeal, which might better be left with the courts below.

If lawyers and statesmen will but remember, that the human brain can perform only a certain amount of thinking, and the human hand only a certain amount of writing, and will then set themselves to work, sifting out of the mass of cases in the lower courts those only which must in the nature of things have their solution in one place and by one body, it will not be difficult so to adjust the business of the court, as to measure it by the ability of the judges to perform it.

But of all the jurisdictions or subjects of jurisdiction over which this court is placed by the constitution, none is comparable in importance with that which makes it the arbiter in all controversies of the states with each other, or with foreign states, save perhaps that other, which makes it the final arbiter, in all questions of disagreement between the organic law of the Republic on the one hand, and the acts of Congress and the constitutions and statutes of the states on the other. These controversies outweigh all others that can arise to the end of time. To keep the peace in all circumstances is the great function of government, and that of a federal government to keep it between the constituent members and between each of them and the sovereign whole.

The establishment of a tribunal for the determination of controversies between the states, was one of the first, if not the first, object in organizing the confederation. It may be regarded as a political axiom, that federation is impossible without a provision for settling controversies between the constituent members. The original articles of confederation provided for it, though inadequately, but enough to show that whatever might be the form or power of the federal body, an essential prerequisite was thought to be a provision for the settlement of interstate disputes; and it may be presumed, that no statesman would have thought

of the commonwealth, in the notes or bonds of the several counties, cities, and towns thereof, *or in the scrip or bonds of the several New England states, of the state of New York,* or of the United States; and said investments shall be made by the treasurer with the approval of the governor and council.

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a tribunal for the settlement of *some* of these disputes adequate, without providing for *all*. It must have been in the minds of those who worked for a Union, to take care that every cause of disagreement between the states should have a means of peaceful solution. The object of an interstate tribunal is to prevent dissensions among the states. This object would be defeated if the scheme did not provide for *all* dissensions; in other words for all controversies.

It is the interest of the people of this country—would it be extravagant to say the interest of the whole human race—that the jurisdiction of this court over controversies between the states should be preserved intact. If no jurisdiction were conferred upon the court other than that of adjudging these controversies, it would still be the greatest tribunal in all the world. Foreigners have looked upon it with wonder. There is a passage in De Tocqueville's Democracy in America, which I will take the liberty of quoting:

"In the nations of Europe, the courts of justice are only called upon to try the controversies of private individuals; but the Supreme Court of the United States summons sovereign powers to its bar. When the clerk of the court advances on the steps of the tribunal, and simply says: "The State of New York *versus* The State of Ohio," it is impossible not to feel that the court which he addresses is no ordinary body; and when it is recollected that one of these parties represents one million, and the other two millions of men, one is struck by the responsibility of the seven judges, whose decision is about to satisfy or to disappoint so large a number of their fellow citizens."

This is the language of an intelligent foreigner and an acute observer. He is not alone. Thinking men everywhere have thought, and often expressed, the like.

Mr. John Stuart Mill, in his considerations on Representative Government, speaking of this country, says:

"The tribunals which act as umpires, between the Federal and State Governments, naturally also decide all disputes between two States * * * The usual remedies between nations, war and

diplomacy being precluded by the Federal Union, it is necessary that a *judicial remedy* should supply their place. The Supreme Court of the Federation dispenses international law, and is the first example of what is now one of the most prominent wants of civilized society, a real International Tribunal."

M. Emile de Laveleye says :

"The hour will arrive for the establishment of a federation of nations, with a Supreme Court like that of the United States, the decisions of which will be carried out by authority ; but it is not yet come. True civilization, true Christian sentiment, do not as yet exert a sufficiently general and undisputed sway over nations."

Thus the thoughts of philanthropists and christians are turned towards the establishment of some tribunal for the settlement of international controversies, and they have looked at this court as the great exemplar of such a tribunal ; one to be expected in a better age, to be struggled for now, and to be gained by successive, and perhaps slow degrees. They see here a tribunal which sits in judgment between sovereign states ; states more populous, more opulent and more powerful than many of those which in the course of the ages have stimulated the intellects, moulded the sentiments and swayed the destinies of men. They see the processes going on quietly without parade, and without a jar. They see the judgments pronounced accepted with acquiescence or executed without resistance. Is it not natural, that they who dream of better days should turn their eyes hither, and seeing the wondrous mechanism of our system should ask, whether that which was contrived to keep the peace between our states, or something like it, cannot be also made to keep the peace between the other states of the world?

The present Lord Derby, speaking in the House of Commons, in 1867, on the "Mermaid" difficulty with Spain, said :

"Unhappily there is no international tribunal to which cases of this kind can be referred, and there is no international law by which parties can be required to refer cases of this kind. If such a tribunal existed, it would be a great benefit to the civilized world."

The true interpretation of our constitution, in my humble judgment, places the controversies which a state of this Union can have with another before this court in the category of those controversies, which a sovereign state of the world may have with another. Every right which New York had in 1789, every right which she had in 1796, she has now, except so far as it has been surrendered or changed by the Federal Constitution. *The form of the remedy has been changed.* Diplomacy, embargo, reprisal and war have given way to judicial process and the decision of judges. The contentions of states must be settled by the arbitrament of reason or the arbitrament of the sword. It is the felicity and the glory of the American constitution that it has substituted the former for the latter. If it has not substituted it for *all* controversies it has left its work half done.

I have dwelt thus long on the general question of jurisdiction, because it was convenient to discuss the whole question at once, rather than wait for the next and most important part of my argument. Recurring now to the particular question of assigned demands, I beg to say, that the assignment of coupons made to the plaintiff before the present suit was brought was real, not colorable. The reality of an assignment is a matter quite distinct from the motive of it. The distinction is recognized in Barney *v.* Baltimore, 6 Wallace, 288, where it is said by Mr. Justice Miller, delivering the judgment, "If the conveyance * * * had really transferred the interest of the former to the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. M'Donald *v.* Smalley and several cases since have well established this rule." Though the motive in the present instance was to cause the suit to be brought, yet the transfer was real and irrevocable. The state has as complete control over the claim as the United States had over the Alabama claims. It can compound it without con-

sulting the assignors, and, if the suit should turn out to be unsuccessful, the state is not required to return the property to the assignors. The title of the statute, pursuant to which the assignment was made, not less than the enactment itself shows that the object of the state was to protect the rights of its citizens, and to that end, and that alone, it required them to cede their overdue coupons to the state; but in no event save that of recovery by the state were they to retain any interest in the claims or any control over the proceedings.

Upon this branch of the case, then, the real question to be answered is: "Whether a state can maintain a suit in this court against another state, upon the obligations of the latter, which have been transferred to the former by its citizens without reserve, though for the purpose of enabling the state to protect its citizens and assert their rights, in cases where they cannot themselves assert them?" Indeed, since it is because they cannot sue for themselves that the state sues for them, we have the strange contradiction presented of a demand founded on the inability of citizens to make it for themselves, answered by pleading this very inability of the citizens as a reason for refusing the state.

Let me here call the attention of the court to an early discussion of the subject by Mr. B. R. Curtis, when he was at the bar, and to a later discussion by Mr. B. T. Johnson. The paper of the former was first published in the *North American Review* in January, 1844, and republished in the Life and Writings of Mr. Curtis, vol. 2, p. 93. In the first volume of the latter work, p. 102, is a letter of Judge Story, commending the article. Mr. Johnson's paper was published in the *American Law Review* for July, 1878. Some extracts from the first of these articles may be appropriate here:

"It has always been admitted to be one of the duties, and consequently one of the rights, of the sovereign power in every nation, to see that gross injustice be not done to its subjects or citizens in a foreign country. * * * * * We conceive also that a foreign tate or sovereign may easily be placed in such a condition as to prose-

cute these claims. It is incident to the sovereign power that it should be able to make itself the owner of such claims. The rules as to the purchase and sale of rights of action which affect individuals are not applicable to the sovereign. The law presumes that the government of a country will not be guilty of champerty or maintenance. Under the common law the king might take an assignment of a debt and sue therefor in his own name, and we have no doubt that the same law exists in all cases. It seems to follow, then, that if the sovereign should take an assignment of a claim and sue therefor in the court of a foreign country, the comity and respect due to the foreign sovereign would necessarily prevent the court from inquiring into the causes and motives of the assignment, especially in a country where the common law exists, which makes all debts negotiable between the sovereign and the subject or citizen ; and if this motive were inquired into it would appear that the foreign sovereign had taken the assignment merely to discharge a duty to his subjects by affording to them a remedy for a supposed wrong."

This closes what I have to say upon the claim of New York as assignee. The smallness of the amount of the coupons assigned cannot affect the question. The Dartmouth College suit concerned directly only a few college records ; Hampden resisted the tax of a few shillings ; but who can estimate the effect of these controversies upon the generations which followed them ?

THE NEXT QUESTION IS THE THIRD WHICH I PROPOSED AT THE BEGINNING OF MY ARGUMENT: CAN THE STATE OF NEW YORK, AS THE SOVEREIGN AND TRUSTEE OF ITS CITIZENS, IMPLEAD THE STATE OF LOUISIANA, IN THIS COURT, FOR THE VIOLATION OF THE LATTER'S OBLIGATIONS TO THOSE CITIZENS?

In discussing this question I lay out of view the assignment of the coupons, or rather I treat it as a transaction between the state and its own citizens, which the former chose to exact as the condition of its intervention. My argument reaches to this extent: if there had been no assignment, the state could have asserted its claim all the same; just as the United States asserted their claims for the spoliations of the Alabama, whether the original causes of action were assigned or not. The assignment cannot impair the claim of the state, if it does

not aid it. Had the United States in the beginning of the Alabama depredations given notice, that they would intervene only on behalf of those who made over their claims to their government, they would not thereby have forfeited or impaired their rights under the law of nations, either as to the claims assigned or those not assigned. It surely must be competent to a state, since it can intervene or not in its discretion, to require any particular formality or evidence as the condition of intervention. Upon this theory, the claim now made is quite independent of that already discussed.

I make the argument, indeed, as if no assignment had ever been made. It has not been objected, that the claim on behalf of citizens of New York generally goes beyond the terms of the statute under which the assignment was delivered, nor would such an objection be entertained in the present condition of the litigation. If it could be made at all, it should have been made by a motion, in the earlier stages of the case. But if it had been then made, it could not have prevailed. The state is here represented by its chief law officer, the attorney-general, to say nothing of the governor of the state having signed the answer to the cross-bill. The authority of the attorney-general could not have been questioned by the defendants, any more than the authority of an attorney in an ordinary suit could have been questioned on the trial of the issues in chief. The authority of the governor or the attorney-general, to maintain the present demand upon Louisiana, should seem to be no more examinable here, than the authority of the president and senate could have been examinable before the arbitrators at Geneva.

That the suit is properly instituted, and that the claim thereon on behalf of all the New York holders of Louisiana bonds is properly made, should seem then to be unquestionable.

The court will bear in mind, that the bill in this case covers two distinct causes of action, and seeks relief either against the state and its officers, or

against the officers alone. The standing of the plaintiff can be maintained in any of these aspects, though I am now discussing only the claim of New York against Louisiana—state against state—under the law of nations, and without reference to any transfer of the bonds, or ownership vested in the plaintiff.

In this discussion there are two propositions to be maintained: one, that before the adoption of the Constitution any state now in this Union would have had the right to complain against any other independent state for the non-payment of its debts due to citizens of the complaining state; and if need were to enforce the complaint by all the means known to the law of nations; and the other, that by entering into the Union the states have not lost this right, but have changed only the form of their remedy. The printed brief put in on behalf of the plaintiff contains references to various authorities in support of the first proposition. The doctrine thus stated is not disputed by any publicist or any statesman, so far as I am aware. There may be cavil about the *duty* of intervening; there may be observations here and there about the expediency of capitalists staying at home and not investing or lending abroad; there may be complaints of abuses of the weak, suffered from the strong; but there has never been to my knowledge a denial by anybody, whose opinion is of the least value, that every sovereign state has had, since the law of nations began, and has now, the right to make the cause of its injured citizens its own, and to insist, by all the means known to the intercourse of nations, that the obligations which another state has contracted with these citizens shall be fulfilled.

To advise capitalists to stay at home and not invest or lend abroad would be anti-social and contrary to the drift of modern sentiment. There is a tide in the affairs of men, as visible and as resistless as the tides which the moon makes to roll from side to side of the globe, and that tide is now setting with a

force, accumulating and hastening as it moves, towards human brotherhood, and the free and helpful intercourse of all the children of men. And of all the states in the world, the Southern states of this Union are the most in need of its influence. If they would listen to true warning voices, they would be often told, that what they want most of all is faith in their fellow men, and fidelity to their own engagements. Between the Potomac and the Rio Grande is spread a region, which, for the fertility of its soil, the variety of its climate, the facility of its harbors, and the affluence of its rivers, has scarcely its parallel on the face of the earth. Let it be understood, that the inhabitants of this region are grouped in commonwealths, every one of which takes for its rule of action, good faith in every vicissitude of prosperous or adverse fortune, and they and their children, and their children's children, will be blest with "the blessings of heaven above, and the blessings of the deep that lieth under."

Besides the citations contained in our brief, taken from the treatises of publicists and from state papers, to show the right of New York under the laws of nations to call upon Louisiana for the fulfillment of its obligations to the citizens of New York, I beg leave to refer to a few facts in our own history.

As evidence of the opinions prevailing when the constitution was, framed, respecting the right of a state to intervene for the payment of debts due to its citizens by other states, I will quote a passage from the argument of Mr. Bradford, attorney-general of Pennsylvania, in the case of Nathan against the Commonwealth of Virginia, reported in the notes to 1 Dallas, 77.

A foreign attachment was issued in 1781, on behalf of Nathan, against Virginia, and levied upon clothing imported by that state into Philadelphia. The delegates in Congress from Virginia, considering this a violation of the law of nations, applied to the Supreme Executive Council of Pennsylvania, by whom the sheriff was ordered to

give up the goods. Nathan's counsel, finding that the sheriff suppressed the writ, making no return, obtained a rule to show cause why he should not return it. The attorney-general opposed the motion, and it was denied. In the course of his argument he said:

"That the plaintiff was under no peculiar inconvenience. Every creditor of this state, or of the United States, lay under the same. If his demand was just, Virginia would, upon application, do what was right. *If not, and flagrant injustice was done him, he might, if a subject of this state, and entitled to its protection, complain to the executive power of Pennsylvania.*"

The provisional treaty, concluded between the United States and Great Britain on the 30th of November, 1782, contained this article:

"It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted."

The 6th article of Jay's treaty contained a more ample and definite provision in favor of British creditors against American debtors, and because this was not fully performed, the United States stipulated by the additional convention of 1802 to pay to Great Britain £600,000 "for the use of the persons described in the 6th article."

The convention between Great Britain, France and Spain for intervention in Mexico, and the letter of our Secretary of State offering to guarantee the payment of the interest on the Mexican debt for the sake of preventing the intervention, not only recognized the existence of the rule of international law, but afforded an instance of its enforcement on the largest scale: an unjust and armed enforcement, which led to the overthrow of the Franco-Mexican Empire, and, as some think, to the overthrow of the Second French Empire itself. England and France are now intervening in the affairs of Egypt, by a series of measures that had their origin in the debts of the khedive to British and French bond-

holders. Our own relations during the present year with Peru and Chili are so many witnesses to the existence of that rule of international law of which I am speaking. In short, there are few doctrines of the law of nations more firmly established than this, of the *right* of intervention to protect the creditors of an intervening state.

Have the states of this Union lost this right? If they have, let it be shown how or by what means it has been lost. There is no article of the Constitution by which it has been expressly taken away. On the contrary the 10th amendment declares that "the powers not delgated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." Powers here mean rights, or rather the former is the more comprehensive term of the two, and includes the latter. One of the definitions of power is: "Ability to act; the faculty of doing or performing; the exercise of a faculty; capacity for action or performance."

I submit now that I have established this proposition: An independent state is by the law of nations clothed with the right or faculty of making an imperative demand upon another independent state, for the payment of debts, which it owes to the citizens of the former. The right of New York, outside of the Union, to make such a demand would have been unquestioned; inside of the Union, New York has the same right.

How is the demand to be made? Formerly, under the law of nations, it would have been made by diplomatic negotiation, and if that failed, then by non-intercourse, reprisals or war. Now, under the Constitution, diplomacy is supposed to be indirectly prohibited, for the reason that a compact or an agreement, except with the consent of Congress, is prohibited. Non-intercourse, reprisals and war are directly prohibited. What then remains? The Constitution gives the answer. This demand made by New York upon Louisiana, for the payment of

debts due to the citizens of New York, can be made in this court and nowhere else.

PASSING NOW TO OTHER CONSIDERATIONS AND OTHER VIEWS OF THE CASE, WE COME TO THE FOURTH AND FIFTH QUESTIONS, PROPOUNDED AT THE OUTSET. The financial officers of Louisiana proceeded under the statute and constitution of that state, as they stood when the consolidated bonds were issued, to levy and collect taxes thus authorized, and had accumulated a large sum of money when the repudiating ordinance was passed. This money now lies in the same hands, awaiting the judgment of this court. Can the judgment reach it and order therefrom the payment of the coupons belonging to the plaintiff? THIS IS THE FOURTH QUESTION.

Another follows:

Should the accumulated fund be found insufficient to pay all the outstanding and overdue coupons, can the same financial officers be ordered, by the judgment, to proceed in the levy and collection of the prescribed taxes, to meet the deficiency? THIS IS THE FIFTH QUESTION.

These two questions may be considered separately, because they involve, to some extent, different reasons. Both assume, however, that the plaintiff is the owner and holder of the coupons. Being so, can the state of New York maintain a suit in this court to reach *these funds and these officers of finance?* That this court has original jurisdiction of a suit by a state against individuals is declared by the Constitution, and has been so decided by this court, in the case of Texas against White, 7 Wallace, 700. New York then being properly here, and the individual defendants being properly here also, has the former a right to any portion of the funds in the hands of the latter?

We are now disembarrassed of the question whether *Louisiana* can be sued upon the assigned coupons. That state might even be dismissed from

the case. We might leave out of view every consideration except that of the plaintiff holding the coupons, and of the individual defendants holding funds devoted to their payment. Under these circumstances, can the court order these defendants to pay these coupons, or a proportionate part, having regard to the whole amount of the accumulated fund and the whole amount of the unpaid coupons? This proportionate amount can be easily ascertained by an accounting under the direction of the court.

There can be no doubt, that it was the intention of the parties, at the time of the exchange of the old debt for the consolidated bonds, to make the payment absolutely certain, beyond the reach of repudiating politicians or a repudiating people—or rather, I might say, it was the intention of those who then acted for Louisiana to make the holders of the old debt think so, as an inducement to accepting the compromise. What was it that they did? They issued the bonds of the state, promising the payment of a fixed sum, at a fixed time, with a fixed rate of interest; levied a tax of 5½ mills on the dollar upon the assessed value of all real and personal property; designated certain officers whose duty it should be to assess and collect the tax and pay the bonds. *This arrangement was to last till the payment of the bonds, principal and interest, should be accomplished.* A diversion of the fund to any other object was declared to be a felony; obstruction of the machinery devised for the payment was declared to be a misdemeanor; and finally it was ordained that each provision of the act constituted a contract between the state and each holder of the bonds.

There is here no room for cavil about the power of a legislature, or the constitutionality of a statute, which affects or limits the taxing power of a state; because the statute was ratified by an amendment of the constitution. The compact between the state and its creditors was as irrevocable as it was precise, if the people of the state in the exercise of their

original and independent sovereignty had the power to make it. That they had the power is clear, unless it had been delegated to the United States, or prohibited to the state. So it is expressly declared by the 10th amendment. Now, it is certain that the power to levy and collect state taxes and pay state debts has not been delegated to the United States nor prohibited to the states. It therefore follows, that the compact between Louisiana and her consolidated bondholders was valid and irrevocable.

It was not only irrevocable by its terms, but it became irrevocable by force of the federal constitution, which declares that no state shall pass any law impairing the obligation of contracts. Subsequent legislation or constitutional ordinance by Louisiana, purporting to annul or qualify the terms of this compact, was a nullity; to be disregarded as though it had never been. We are thus to look at the statute and ordinance under which the consolidated bonds were issued and taken, as if from that hour until now, there had been no legislative assembly held in Louisiana, and no convention of her people.

Here, then, stand the holder of the obligations and the holders of the funds designated for their payment. What valid reason can be given why the payment should not be enforced? It is said, that the funds belong to the state and cannot be controlled by judicial process. But in what sense are they the funds of the state? They are the proceeds of state taxes, no doubt, but these taxes have been appropriated to a particular purpose, and are in the hands of certain officers for the fulfillment of that purpose. A subsequent direction by any state authority, assuming to divert them to any other purpose, is a violation of the original compact and, therefore, a nullity. The disposition to be made of the funds is precisely the same as if such subsequent direction had not been made. Suppose that neither Legislature nor Convention had met since 1874, but that the fiscal officers, who had collected

the taxes, had, of their own motion, refused to pay the interest on the bonds. The answer that would then have been given to a suit against them, is the only answer that can be given now.

When I said, that the contract between Louisiana and the bondholders was irrevocable I should perhaps have added, that there is one argument, however, which, if it were sound, would reach beyond the federal and state constitutions, and that is that a nation (and if so, an American state) cannot impair its own sovereignty, and, therefore, cannot make an irrevocable contract. The argument is, however, unsound both in its premises and in its conclusions. A state can impair its sovereignty. Every state in this Union did so when it entered into the federal bond. It not only impaired its sovereignty for the time being, but entered into an irrevocable compact, forming, in the expressive and now famous words of the late chief justice, "an indestructible union of indestructible states." With this great example of our own federal Union before us, it will not do to say, that an independent state cannot impair its own sovereignty. If it can impair it in one respect, it can in another. Take the power of taxation for example. There is nothing sacred about it. Indeed, there is scarce any particular, in which the power of a government is less sacred than in the matter of taxes. A tax is a forced contribution; and when it is considered to what base uses the proceeds of these contributions are so often misapplied—overgrown armies, worthless navies, fictitious pensions and arrears of pensions, river and harbor jobs, post office star routes, and robberies of all sorts—one is not delighted to hear of the sacred sovereign right of taxation. But whether the power to tax be well or ill used, nothing can be more certain, than that it may be made the subject of contract. This court has in many instances declared acts of the state legislatures void, because they attempted to revoke contracts made by previous legislatures, to exempt particular property

from taxation. Again, it is supposed to be one of the attributes of sovereignty to exercise control over all persons and property within the territorial limits, yet it was early decided by this court that a state by its legislature, without an organic act of the people, might bargain away its control over corporations. Every treaty, to a certain extent, impairs the sovereignty of the high contracting parties, sometimes for a limited period, and then again for all time. Foreign ships enter and leave American ports by virtue of treaties, which forbid the American Congress to close American ports to all but domestic ships, and these treaties cannot be abrogated except after a stipulated delay.

An independent state being under no outside control has the legal faculty of doing whatever it pleases with itself. It may destroy or limit its separate existence or any of its separate functions. Suppose that in the statutes and ordinances of Louisiana a stipulation had been inserted, that every holder of a bond should have the right to sue the state in one of its own courts would not this stipulation have been valid? The Parliament of England might authorize a loan for a special object and set apart a sinking fund for the payment of the loan, place it in charge of a specified depository, and provide, that the fund-holders might have recourse to the Queen's courts against the depository for the proper application of the funds; and is it to be doubted, that a repeal of these provisions by a later Parliament, would be a breach of faith and a violation of the contract? Whatever might be said about the validity of such a subsequent act, having regard to the omnipotence of Parliament, there can be no doubt that if Parliament were not omnipotent and could pass no law impairing the obligation of contracts, and there were a tribunal to enforce such a constitutional provision, the subsequent act would be held void, and the previous one would be enforced.

Applying the principles, which I have thus endeavored to establish, to the present case, we see

here a contract explicit and specific. It points out precisely what is to be done and the persons who are to do it. If they act, as they are required by the constitution and the law to act, the money will be raised and paid; if they do not thus act the judiciary must apply the remedy.

The more narrowly we look into this contract, the more clearly we see, that it was as stringent as language could make it. If one were to set about preparing a plan for making the repayment of a government loan perfectly safe, he could scarcely devise one better than that arranged by Louisiana in this instance. First, an act of assembly was passed, notice of which was to be published in the journals of New Orleans, New York, London, Paris and Amsterdam, entitled: "An act to provide for funding obligations of the state, by exchange for bonds; *to provide for principal and interest of said bonds; to establish a board of liquidation;* to authorize certain judicial proceedings against it; to define and punish violations of this act; to prohibit certain officers diverting funds except as provided by law, and to punish violations therefor; *to levy a continuing tax and provide a continuing appropriation for said bonds; to make a contract between the state and holders of said bonds;* to prohibit injunctions in certain cases; to limit the indebtedness of the state and to limit state taxes; to annul certain grants of state aid; to prohibit the modification, novation, or extension of any contract heretofore made for state aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws."

By this act a permanent board was established, called a board of liquidation, consisting of the governor, lieutenant-governor, auditor, treasurer, secretary of state and speaker of the House of Representatives, and a seventh person to be elected by them, called a fiscal agent for the state. This board has been in existence ever since its establishment. It was to exchange consolidated

bonds of the state having forty years to run and bearing interest at seven per cent. for the outstanding bonds and auditor's warrants, at the rate of sixty cents on the dollar. To secure the payment of these consolidated bonds, beyond peradventure, a tax of five and one-half mills on the dollar upon all real and personal property in the state was levied. This tax was to be collected for the purpose of paying the interest and principal of the bonds, and was "*set apart to that purpose, and no other.*" It was declared to be a "*continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest, and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the auditor and treasurer and the said Board, respectively, to collect said tax annually, and pay said interest and redeem said bonds, until the same shall be fully discharged.*"

The tenth section provided that "any judge, tax collector, or any officer of the state obstructing the execution of this act, or any part of it, or failing to perform his official duty, thereunder, shall be deemed guilty of a misdemeanor," etc.

The eleventh section provided, that "*each provision of this act shall be, and is hereby declared to be, a contract between the state of Louisiana and each and every holder of the bonds issued under this act.*"

The thirteenth section provided that, "The entire state debt prior to the year of our Lord one thousand nine hundred and fourteen shall never be increased, directly or indirectly, beyond the sum of fifteen millions of dollars hereby authorized; *it being the intent and object of this act, and of the exchanges to be effected thereunder to reduce and restrict the whole indebtedness of the state* to a sum not exceeding fifteen millions of dollars, *and to agree with the holders of the consolidated bonds to be issued hereunder that the said indebtedness shall not*

be increased beyond said sum during said period."

An amendment of the Constitution of Louisiana was thereupon adopted, the first section of which is as follows: "*The issue of consolidated bonds* authorized by the General Assembly of the state at its regular session, in the year 1874, *is hereby declared to create a valid contract between the state and each and every holder of said bonds, which the state shall by no means and in no wise impair.* The said bonds shall be a valid obligation of the state in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor. *To secure such levy, collection and payment the judicial power shall be exercised when necessary. The tax required for the payment of principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the state to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for* such payment from the treasury."

These bonds were issued and taken. Hundreds of thousands of them are held by citizens of New York, and that state holds by assignment some of the coupons. The board of liquidation remains intact; and inasmuch as public officers are presumed to do their duty, the board is presumed to have levied and collected the tax in all these years, and of course has ample funds on hand wherewith to pay the interest already accrued. This board has moreover the power to levy and collect the tax and pay the interest as well as principal accruing hereafter.

The state of New York, the state of Louisiana, and the Board of Liquidation, including the Treasurer of the state, are now in court. The plaintiff asks, that the interest already accrued be paid. What reason can be given for not paying it?

Not that the people of Louisiana in 1879 prohibited the payment, for that prohibition was a nullity. That the transaction of 1874 created a contract between the state and the holders of the bonds, which could not be impaired by any subsequent act of the state, cannot at this time be questioned. This court has over and over again affirmed the principle, on which this contract now stands firm as adamant.

The question I have said, is to be treated, as if there had been no subsequent constitutional ordinance or act of assembly. Standing thus alone upon the ordinance and act of 1874, what legal answer can the board of liquidation make to our demand for payment? They cannot say that the money is not in their hands. It is presumed to be there. They have not denied that it is there, and if they had made the denial, they should have followed it by proving that they had not done their duty. Besides this, the act of assembly passed this very year (pages 36 and folio 111 of the record) shows that there is a large fund on hand. Nor can these defendants say, that the fund has not been appropriated by the state legislature, and *appropriated to the payment of this interest.* It was appropriated by the act and ordinance of 1874. That ordinance declared in so many words, as we have seen, that: "*The tax* required for the payment of the principal and interest of said bonds *shall be assessed and collected each and every year* until the bonds shall be paid, principal and interest; *and the proceeds shall be paid by the treasurer of the state to the holders of said bonds as the principal and interest of the same shall fall due; and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury.*"

The act of Assembly had already declared, that "*The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest, and the said appropriation shall be a continuing annual appropriation during the same period, and this*

levy and appropriation shall authorize and make it the duty of the auditor and treasurer and the said board, respectively, to collect said tax annually and pay said interest and redeem the said bonds until the same shall be fully discharged."

This constitutional ordinance was, of course, valid, and the act was valid, because made so by the ordinance, if for no other reason. We are accustomed to annual appropriations because our legislatures in general have annual sessions; but it is no more necessary, in the nature of things, that an appropriation should be annual, than that it should be biennial, or for any term of years, or for life. In England the appropriation to the personal service of the sovereign is made at the beginning of the reign, for the whole reign. In states where legislative sessions are biennial, the appropriations must be for two years. The session might be once in five years, or once in forty, for the matter of that. In the present instance, the appropriation was a continuing one for forty years; that is, if the bonds were not sooner redeemed.

The duty, then, of this board of liquidation, to make the payment being clear, and the right of holders of the coupons to payment out of the fund being equally clear, and the performance of this plain duty being refused, the only question that remains is the question of remedy. Is this court powerless to direct the board or the treasurer to pay the plaintiff out of the fund already collected and in hand? I am now speaking only of the coupons which belong to the plaintiff. The defendant's counsel answers, that the funds belong to the state, and, therefore, cannot be touched by the court. The counsel is at fault, both as to premises and conclusion. The funds do not really belong to the state, as I have already said; they do not belong to it, any more than money deposited in bank, to my credit, belongs to the bank, and not to me. Though the bank may hold the money as depository, and may have perhaps mingled it with other mon-

eys in its hands, it holds this in trust for me. It is in equity mine, even though not segregated from the rest, and I have an equitable lien upon it. *But the Louisiana act of Assembly did set apart this fund and appropriate it to this purpose, and no other.* Here are the words: "That a tax of five and a half mills on the dollar, of the assessed value of all real and personal property in the state, is hereby annually levied, and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and *the revenue derived therefrom is hereby set apart and appropriated to that purpose and no other.*"

Suppose, however, that the fund did belong to the State, and had not been set apart, the statute and constitution of 1874 have ordered it paid. They constituted an order for the payment. The order could not have been stronger, if it had been in the form of a draft upon the fund. Suppose that the plaintiff had procured a draft of Louisiana on the board of liquidation, for the payment of these coupons, and the payment had been refused, and this suit had been thereupon brought, could the board have defended themselves, in not paying, by answering that the fund belongs to the state? So far then as these funds in the hands of the board of liquidation are liable to the drafts of the treasurer the remedy is perfect. A bill in equity for payment out of the fund in hand is appropriate, since if there be not enough, an accounting must be had, to ascertain what proportion of the money on hand is applicable to the plaintiff's demand.

If there be a deficiency, and further funds have to be raised, an order in the nature of a mandamus would be an appropriate remedy to compel the levy and collection of the tax But when a state of the Union comes into this court, its remedy is not to be measured and restricted by the rules which apply to the litigation of private persons. This court has already said in Board of Liquidation *v.* Macomb, that an injunction and mandamus are ap-

propriate remedies to be applied sometimes in the same suit, and in Rhode Island *v.* Massachusetts, the court declared, in the most emphatic manner, as if to preclude all future cavil, that it would mold the process to suit the demands of justice. Here are trust funds, and the suit is in part to enforce the trust.

Before considering the question respecting the form of proceeding, however, should it not be considered whether, in a suit between states, where the proceedings are not regulated by statute, but moulded by the court, to suit the exigency of the case, there should be, or can be, any *question of form?* The parties are here, the facts are made known, and the judgment should be pronounced according to the right of the case. How would it appear to the world when told, how would it look in the books when read, that the laws of the Republic require New York first to recover a judgment at law, then apply by a bill in equity to reach the funds in the hands of the board of liquidation, and after that ask for a mandamus to compel the board to levy and collect the tax and pay over the proceeds!

In the case of Florida against Georgia (17 How., 492), a question of form arose, and the court through the chief justice said:

"At a very early period of the government a doubt arose whether the court could exercise its original jurisdiction without a previous act of Congress regulating the process and mode of proceeding; but the court, upon much consideration, held; that although Congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases as fully as in any other court, yet the omission of the legislature on the subject could not deprive the court of the jurisdiction conferred. It was a duty imposed upon the court, and in the absence of any legislation by Congress *the court itself was authorized to prescribe its mode and form of proceeding so as to accomplish the end for which the jurisdiction was given* * * * and it became, therefore, *the duty of the court to mold its proceedings for itself in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred; and in doing this it was without doubt one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained.*"

The present case is peculiar in most of its circumstances. We are dealing, not with a legislative, or an imperfect, or an indefinite compact, but with a constitutional compact, full and definite in all its parts. A state of this Union effected a compromise with its creditors at the rate of sixty cents on the dollar, and to obtain it pledged and appropriated to them a certain tax on all property in the state, to last until the payment of the new and renewed debt; and, in order to make the levy, collection and payment sure beyond interference of legislature or people, established a permanent board, with power to do these things of itself—power to deliver the bonds and to pay them—to make the promise and to fulfill it. The compact was not only made by the legislature, but ratified by the people in their sovereign capacity, by an organic act—the highest and most solemn known to the commonwealth, such an act as makes governments and institutions. The board thus created proceeded to exercise its power by levying the tax. This board is still in existence and acting. It is under these circumstances that the state of New York seeks a judgment for the payment of the money which is its due.

In other words, in order to induce creditors to consent to a reduction of the state debt, the people of the state, as a part of their constitution of government, established a permanent board of officers, with power to issue new bonds in exchange for old, at a reduced rate, and to assure the payment by levying and collecting taxes, at a rate fixed in the constitution, and to last until payment should be made in full, and fencing this assurance round with various safeguards, making it as much impossible for the engagement to be broken as it is possible to do in human affairs. This engagement, the most solemn possible for any people, they essayed five years afterwards to break. And the question now is whether the constitution and the statute by which this engagement was effected were, after all, but so much waste paper.

This court has frequently exercised the power to compel public officers to assess and collect taxes for the payment of debts. It is true, that in most of these cases, the debts to be paid were the debts of municipalities, but it is not easy to see how that fact is important. The question is not so much, who owes the debt, as whose duty it is to make the payment, or provide the funds. Municipalities, moreover, are but state agencies; the power of taxing is a state power; the officers who impose and collect the taxes are state officers. If they can be ordered to levy a tax of one kind, they can be ordered to levy a tax of another kind.

There is nothing especially sacred in state or federal treasuries, or in state or federal officers of finance. Nothing is sacred but right and law. If money in a government treasury is pledged to me, my right to have it is more sacred than the right of its keepers to withhold it. A court of law, which is but another name for law itself, has often, in dispensing justice, laid its hand on a government treasury and the treasurer. We have heard a great deal of the *discretion* of officials. They have no discretion whatever to do or not to do that which the law commands; and in this country of law, where no man is above it, as none is beneath it, the judicial department has the power, and having this it is its duty, for the protection of private rights, to oblige every man in office, as it obliges every man out of office, to fulfill the law. No man is our master. We have no master but the law of the land, and when that law directs any one, high or low, to do an act, in which a citizen has an interest, he should be compelled to do it. If he has a discretion, that is, a right to judge for himself, whether he will or will not do the particular thing demanded, he cannot be compelled by the courts to do it; but if the thing to be done is certain (and that is certain, according to the law, which can be made certain), then he can be compelled to its performance.

Let us see how far the courts have sanctioned

these theories. In Marbury's case, it was decided, that a federal secretary of state could be reached by mandamus, when he had no discretion whether to deliver or withhold a commission to office. In Osborne's case, money was taken out of the treasury of Ohio against the will of the treasurer. True, a like sum had been taken from the bank and put into the treasury. The judgment required it to be repaid out of the state treasury.

In Kendall's case, it was decided, that a mandamus could be issued compelling the postmaster-general, to credit certain persons with a sum of money as due to them. The court said that

"It would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president. And this is emphatically the case where the duty enjoined is of a mere ministerial character."

In the Knox County Commissioner's case (24 How., 383), it was declared by Mr. Justice Grier, delivering the opinion of the court, that

"Even assuming that a general law of Indiana permits the public property of the county to be levied on and sold for the ordinary indebtedness of the county, it is clear that the bonds and coupons issued under the special provisions of this act were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which they were negotiated. It is especially incorporated into the contract, that this corporation shall assess a tax for the special purpose of paying the interest on these coupons."

In Van Hoffman's case (4 Wall., 535) the headnote is as follows:

"1. Where a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract within the meaning of the constitution, and cannot be withdrawn until the contract is satisfied. The state and the corporation in such a case are equally bound.

"2. A subsequently passed statute, which repeals or restricts the power of taxation so previously given, is, in so far as it affects bonds bought and held under the circumstances mentioned, a nullity.

"3. It is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed.

"4. If it does not perform this duty, a *mandamus* will lie to compel it."

The opinion of the court, delivered by Mr. Justice Swayne, has the following language pp. (554–555):

"It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other.

"The laws requiring taxes to the requisite amount to be collected in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1868 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes, in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right—of no practical value—and render the protection of the constitution a shadow and a delusion.

In Davis against Gray, (16 Wall., 203,) it was ruled:

"That a Circuit Court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States when such execution will violate the rights of the complainant.

"That where a state is concerned the state should be made a party if it can be done; that it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against her officers in all respects as if she were a party to the record."

In Macomb's case, (92 U. S, 531,) an injunction, in favor of the holder of a consolidated bond, was sustained against the same board of liquidation, that is now before the court, forbidding it to obey a later statute of Louisiana, requiring the issue of consolidated bonds for the payment of the debt of the state

to the Louisiana Levee Company. The opinion is most important, as touching the present case.

"It was the special object of that scheme, by providing extraordinary security and sanctions for the payment of the consolidated bonds, to induce the public creditors to reduce their claims forty per cent. and exchange them for these new securities, and thus diminish the aggregate indebtedness of the state $10,000,000." * * *

"On this branch of the subject the numerous and well-considered cases heretofore decided by this court leave little to be said. The objections to proceeding against state officers by *mandamus* or injunction are: first, that it is, in effect, proceeding against the state itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law, for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

In Meriwether's case, (102 U. S., 472,) where an attempt was made by the legislature of Tennessee, to defeat the previous action of this court with respect to the enforcement of the power of taxation, by the dissolution of municipal corporations, relief by bill was refused solely upon the ground, as I understand it, that there were no tax officers in existence.

In Hartman's case, 102 U. S., 672, a mandamus was ordered to compel the treasurer of Richmond, who had in charge the duty of collecting the state taxes in that city, to receive in payment the coupons of state bonds, issued pursuant to the funding act of the state which contained a stipulation that they should be received for taxes. Here was a command issued to a state officer, for the enforcement of a promise of the state—a promise of imperfect obliga-

tion, says my learned friend—which promise a subsequent legislature had attempted to impair by taxing the coupons.

In Wolff's case, (103 U. S., 358,) it was decided that:

"As long as a city exists, laws are void which withdraw or restrict her taxing power so as to impair the obligation of her contracts, made upon a pledge expressly or impliedly given, that it shall be exercised for their fulfillment."

"Although such laws be enacted, *mandamus* to compel her to exercise that power to the extent she possessed it before their passage, will lie at the suit of a party to such a contract who has no other adequate remedy to enforce it."

I quote several passages from the opinion, because the argument is a better one than I can make:

"The argument in support of the act is substantially this: that the taxing power belongs exclusively to the legislative department of the government, and when delegated to a municipal corporation may, equally with other powers of the corporation, be revoked or restricted at the pleasure of the legislature.

"It is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation, by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly, as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon these means, is prohibited by the constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control of the legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfillment. However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts. * * *

"This prohibition of the constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon those means. As observed by the court in the case cited, 'without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution. The obligation of a contract is the law which binds the parties to perform their agreement.'

"The restraint upon the legislature, to the extent mentioned, by the contract clause of the Constitution, against revoking or limiting the power of taxation delegated by it to municipal bodies as the means of carrying out the purposes of their incorporation, or purposes designed for their benefit, is a different matter from that of exempting property from taxation; and even in the latter case it has been adjudged in repeated instances that one legislature can bind its successors. The restraint in no respect impairs the taxing power of the existing legislature or of its successors, or removes any property from its reach.

"These views are not inconsistent with the doctrine declared by the decision of the Court in the recent case of *Meriwether* v. *Garrett*, 102 U. S., 472. There the charter of the city of Memphis had been repealed, and the state had taken the control and custody of her public property, and assumed the collection of the taxes previously levied, and their application to the payment of her indebtedness. The city with all her officers having thus gone out of existence, there was no organization left—no machinery upon which the courts could act by *mandamus* for the enforcement of her obligations to creditors. The question considered, therefore, was whether the taxes levied before the repeal of the charter, but not paid, were assets which the court could collect through a receiver and apply upon judgments against the city.

"Here, the municipal body that created the obligations upon which the judgment of the relator was recovered, existing with her organization complete, having officers for the assessment and collection of taxes, there are parties upon whom the courts can act. The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed and by *mandamus* compel, at the instance of parties interested, the exercise of that power as if no such legislation had ever been attempted."

In the case now before the Court the officers whose action is sought are present. They were appointed at the beginning, and they have not been changed. They are still acting, and still collecting, not only the tax of five and a half mills imposed by the statute and ordinance of 1874, but if I read the repudiating ordinance of 1879 aright, a tax of six mills.

Having thus gone over the several positions for which I am contending, I venture to recapitulate and restate them in another form and order. At the head I place these three related propositions: that under the law of nations one state can rightfully prefer a complaint against another for the non-payment of its debts to citizens of the complaining state, or to use the words of Phillimore: "*The debt so contracted with foreign citizens, whether in an individual or a corporate capacity, constitutes an obligation of which the country of the lenders has the right to require and enforce the fulfillment.* Whether it will exercise that right or not is a matter for the consideration of its private domestic policy;" that the states of our Union have now every right which independent states have under the law of nations, except so far as particular rights, of which there are none involved in the present discussion, have been delegated to the Union or denied to the states by the federal constitution; and that the remedy only is changed from force to reason, from diplomacy and armed collision to peaceful contention before this court. Here, I contend, is lodged original jurisdiction of every controversy which one state has, or can have, with another. When two states are before this court, it must decide whether one of them has or has not a just cause of controversy with the other, but the duty of judging between them in every possible case is devolved upon the court. This is the theory of the constitution; a theory to be recommended rather than gainsaid. It is the only theory upon which the peace of the Union can be permanently preserved. The constitution does not enumerate the questions to be judged; that would

have required a treatise on law, state and federal, national and international, and the fore-knowledge of future transactions. All that our great charter assumes to do, and all that it does, is to provide a tribunal for the adjudication of every question, whatever it may be, whether it arises between the old states of the confederacy or the new, or grows out, of the affairs of a century ago, of the present year or of a century to come. The court, as I venture to submit, has no discretion whether to accept or to decline the jurisdiction. Whenever one state makes a demand against another state it must be heard. The decision may be against the demand, but a decision must be made; and to that end the cause must be heard. The great declaration of rights extracted from King John by the barons of England, is as imperative in human affairs now as it was then, and is as appropriate to contentions between states as to contentions between individuals. "Justice shall not be denied to any one, nor delayed."

After these propositions I place another: That each state has the right to make itself owner of the claims of its citizens against any other state, and to proceed against it in this court for the payment of such claims. And lastly, independently of the previous propositions, I submit, that being the owner of certain claims against Louisiana which were provided for by the statute and ordinance of 1874, and which it is the duty of the board of liquidation to pay, New York may confidently ask this court to direct the board of liquidation to proceed in the discharge of the duty imposed upon it, in respect of which it has no discretion.

It results from these several propositions, if they or any of them should be deemed well supported, first, that a judgment should be rendered, declaring that the statute and ordinance of 1874 constituted a contract between the state of Louisiana and the bondholders, which could not be impaired by any subsequent act of the state; that the repudiating ordinance of 1879 was a violation of the federal

constitution and, therefore, a nullity; that the state is bound to pay the principal and interest of the bonds; that the fund arising from the tax, or collected by the board of liquidation, must be appropriated to the payment of the coupons already due in ratable proportion; that for the payment of interest and principal hereafter to become due, the board must proceed to levy and collect the tax and make the payment stipulated by the terms of the contract, and that the plaintiff may apply at any time hereafter on the footing of this judgment for further instructions, as to any relief to which the citizens of New York may be entitled; or next, if such judgment should be refused, then that one be rendered against all the defendants, directing the payment of the coupons already due; or lastly, if that should be refused, then, that an accounting be had, to ascertain the amount of taxes collected by the board of liquidation, and the amount of outstanding overdue coupons, and that the board of liquidation be ordered to pay the proportion due to the plaintiff on coupons already due, and, for any deficiency it be ordered to proceed and levy the tax necessary to pay the same.

There need be no question about the means of executing the judgment in any of the forms proposed. The first would, in a great degree, execute itself. After its rendition no officer of the state, judicial or ministerial, could find excuse for not doing his duty, and conforming his conduct to the judgment of the court; the second and third would be executed directly against the individual defendants.

It remains now only to answer more particularly than I have done some objections of the learned counsel for the defense. If I should seem to speak of these less respectfully than I might, I beg to be understood that I have, nevertheless, great respect for the counsel himself; for do I not know that in the perilous times through which we lately passed, when he put aside the ermine he laid it down as

pure as he took it up, and that in his after life he has illustrated the graces of learning and the dignity of virtue.

One of the objections of the learned counsel is, that the debts of states are debts of honor only; engagements of imperfect obligation, which the debtors may keep or break at will, without accountability anywhere. This is a strange doctrine to hold and a stranger to promulgate. In moral philosophy an engagement of imperfect obligation is one which the promissor is not bound by *any sanction* to fulfill. Is the debt of a state one of these? Is there no sanction for it? I have poorly performed my part in this argument, if I have not shown, that a state which promises is bound to perform, and if the individual to whom it makes a promise cannot oblige it to perform, the country to which the promisee belongs can. Was that an imperfect obligation of France which President Jackson threatened to enforce by the fierce process of reprisal? Were they imperfect obligations which Mexico entered into with English and French subjects, and of which the cannon of Vera Cruz and Puebla demanded the fulfillment? Were they the imperfect obligations of the Khedive of Egypt, which the arms of England and France are threatening to enforce? Was it an imperfect obligation of Louisiana, which the court in Macomb's case enforced by injunction? Can that be called a promise of imperfect obligation, one of the provisions of which is that to secure its fulfillment "the judicial power shall be exercised when necessary?" Was that a promise of imperfect obligation which, as the state proclaimed, "created a valid contract between the state and each and every holder of said bonds, which the state shall by no means and in no wise impair?" Was that a promise of imperfect obligation which expressly declared, "that the bonds shall be a valid obligation of the state, in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of

the tax therefor?" Was that a promise of imperfect obligation, which contained the provision, "that the tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the state to the holders of the said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury?" The learned counsel reasons in a circle: the promise is an imperfect obligation, he says, because it cannot be enforced, and it cannot be enforced because it is of imperfect obligation. No matter how the enforcement may be effected, whether by legal process or the procession of armies, the obligation is perfect, if it can be enforced at all. Every obligation of one nation to another, under the law of nations, is of perfect obligation; and so are the obligations of the states of this Union towards each other, under the federal compact. The argument of the learned counsel, and I might say the same of the opinion of the circuit judge of the fifth circuit in Elliott's case, appears to me to rest upon this fallacy: that a state cannot by any act, constitutional or legislative, bind itself except in honor. This is as much as to say, that the only real signifiance of the statute and ordinance of 1874 was this: "It is our present intention that the board of liquidation shall assess and collect a tax sufficient for the payment of these bonds, but this intention is revocable; we may change our minds, and if we do, you must then take what we choose to give!" And then what is to come of the solemn declaration, made as if to crown the edifice of the compact, that "the judicial power shall be exercised when necessary?" This means, of course, the judicial power of the State of Louisiana, and the whole of its judicial power, wherever and in whatever courts residing.

Another objection of the learned counsel is, that it is not possible for New York to have a controversy with Louisiana, because the two states are forbidden to enter into an agreement with each other, except with the assent of congress, and the present suit is upon an agreement not made with such consent. I have already said something with respect to this objection, but I will now answer it more fully. The present suit does not rest upon an agreement between New York and Louisiana. The principal cause of action is the impediment which Louisiana has interposed to the performance by her officers of their duty, under the contracts which she made with her creditors, many of these being citizens of New York. All these contracts she afterwards, by a pretended ordinance, repudiated. It is to set aside that repudiating ordinance, and to enjoin the diversion of the funds set apart for the payment of the bonds, to enforce the trust confided to a board appointed by her, and to compel the further performance of their duties, that this suit is brought. Such is the main purpose of the bill. This purpose reaches to all the bonds held by citizens of New York.

There is, however, if this part of the judgment should be denied, another and subordinate one, which would give an installment of relief, and would probably lead to the enforcement of all the bonds; and that is, the demand for the payment of the overdue coupons, out of the trust funds in the hands of the board of liquidation, or which could be placed there by the due performance of its duties. If, with respect to this last demand, the question of an agreement between New York and Louisiana is raised, there are several answers. One of them is, that the transfer of the coupons constituted no agreement whatever between the maker and the bearer. These coupons are promissory notes payable to bearer. The promise is altogether one-sided. Louisiana promised to pay a certain sum at a certain time to the bearer of the paper, whoever it might be. The

bearer promises nothing. Agreement means strictly a mutual transaction where both parties do, or agree to do, something. The coupon is rather the end or outcome of an agreement than the agreement itself. Chitty, in the very first sentence of his Treatise on Bills and Notes, says, that a bill of exchange "was in its origin the mode of completing the *previous* distinct contract of exchange or bargain between A and B at one place, that A would cause money to be paid to B or his assign at another place, by C, a third person, a debtor to A, or supplied by him with value to the amount." A bill of exchange, as between the acceptor and the holder, is like a promissory note.

But let it be supposed, that the holding of the coupons did create an agreement between the maker and the holder, it was not such an agreement as the constitution forbade to be made, without the consent of Congress. Most certainly the constitution does not extend to every kind of agreement. If, in a suit pending between two states, a stipulation should be entered into respecting a commission abroad, or the admissibility or effect of certain evidence, or any other incident in the conduct of the suit, it surely would not be thought necessary to get the consent of Congress. The reason of the intervention of the attorney-general in Florida against Georgia was, that something might be done between them which would affect the general government. The commission appointed by New York and New Jersey to establish the boundary between them on the Hudson, was, I think, agreed to without any previous consent of Congress, and indeed without the consent of Congress at all; though the final settlement was assented to, for the obvious reason that an agreement respecting a boundary is one of those which affects political relations. The judgment in *Missouri* against *Iowa*, 7 How., 660, was not ratified by Congress, if I am correctly informed.

If I might venture on a definition of the agreement intended by this clause, it would be this: an

express agreement affecting the political relations of the states. An implied or incidental agreement could hardly have been intended, because there was no reason for it, and because such an one can hardly be avoided in the relations of states with each other, any more than it could be avoided in the mutual relations of individuals. Nor is it to be supposed, that an agreement of a purely commercial character could have been intended, because there was no perceptible motive for it. An "entangling alliance," or some agreement which would affect the political relations of the states with each other, should seem to be alone within the reason of the provision.

This clause of the constitution has not been much considered by the courts. Story, in his Commentaries on the Constitution, section 1403 says :

"The latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other. Such compacts have been made since the adoption of the constitution. The compact between Virginia and Kentucky, already alluded to, is of this number. Compacts settling the boundaries between states are or may be of the same character. In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government ; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

In Rhode Island *v.* Massachusetts the opinion of the court contained this remarkable passage, (12 Peters, 743) :

"Then came the constitution, which divided the power between the political and judicial departments, after incapacitating the states from settling their controversies upon any subject, by treaty, compact, or agreement ; and completely reversed the long, established course of the laws of England. *Compacts and agreements were referred to the political, controversies to the judicial power.* This presents this part of the case in a very simple and plain aspect. All the states have transferred the decision of their controversies to this court ; each had a right to demand of it the exercise of the power which they had made judicial by the confederation of 1781 and 1788 ; that we should do that which neither states or Congress could do, settle he controversies between them. We should forget our high duty

to declare to litigant states that we had jurisdiction over judicial but not the power to hear and determine political controversies. * * * * We should equally forget the dictate of reason, the known rule drawn by fact and law, that from the nature of a controversy between kings or states, it cannot be judicially that where they reserve to themselves the final decision, it is of necessity by their inherent political power, not that which has been delegated to the judges as matters of judicature, according to the law. These rules and principles have been adopted by this court from a very early period."

And in Florida *v.* Georgia the opinion of the court, delivered by Ch. J. Taney, has the following:

"And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void, without the assent of Congress. *This provision is obviously intended to guard the rights and interests of the other states, and to prevent any compact or agreement between any two states which might affect injuriously the interests of the others.*"

The fact of investment by the states in the securities issued by the others is of itself evidence of a practical construction of the constitutional provision. That the practice has been general and long-continued may easily be seen by examining the statutes of the different states. I have already quoted the latest statutes of Massachusetts. The assent of Congress may be implied as well as expressed. So said this Court in Holmes *agst.* Jennison. But, after all, the only reasonable construction of the constitutional provision is, that it prohibits express agreements only, such as independent states are accustomed to make with each other, and not to such relations as follow from the transfer of negotiable paper.

My learned friend argues as if he thought it a great humiliation for a sovereign state to be answerable for its engagements before any tribunal. Is it not rather a humiliation to refuse to answer? What does a refusal mean? It means that you will not allow any one to judge of you but yourself. This is the height of arrogance, as it is the height of injustice. If a man cannot be a just judge in his own case, no more can a personal sovereign or a sovereign state. The immunity from

suit is a feudal privilege, born of the times when few were masters and the rest were slaves. It has no place in modern ideas, nor indeed in modern practice, if we except two governments, one the freest and the other the least free among civilized states. Of all the nations of the earth the United States of America and Russia are the two exceptions.

A state, which is an aggregation of individuals, is no more exalted above prejudice and passion than the individuals who compose it, and it is quite as unjust, quite as savage, quite as cruel for the state to say, "I will be judged by no one but myself," as it would be for an individual to say it. The truest, the noblest rule—the only true and noble rule—is that all are equal before the law; the individuals, the minor corporations, which are minor aggregations of individuals, and the great corporations, the states, which are the aggregation of all the individuals of the commonwealth.

The greatest of all the functions of government is to do justice, and justice is to render to every man his own. To refuse to the judges of the land the function of rendering justice between the citizen and the state is virtually to deny that they are capable of doing it, and if so they must be incapable of doing it between citizen and citizen.

The learned counsel relies very much on some English cases, and especially on Twycross against Dreyfus, as if to show not only that a foreign state cannot be sued in an English court, but that a fund appropriated by such state to the payment of a particular debt cannot be reached by English process. That an independent state cannot be sued in the courts of any country but its own, is one of the maxims of the Law of Nations, resulting from the principle of the equality of states. For this reason, one state is not amenable to the jurisdiction of any other state or of its judges. As to the means of reaching a fund appropriated to a particular purpose, that is another question, which depends alto-

gether upon the domestic law, and on the point whether the fund can be reached without impleading the sovereign. As to the latter, it is sufficient to say here, that the law of England, whatever it may be, can have no application on the question of the right of a state to be sued.

Twycross' case is claimed by the defendants' counsel to be similar to the one before the court. But there is no real similarity. In that case the plaintiff, it is true, was the holder of bonds of the Peruvian government. It is also true, that this government had printed on each bond the following statement:

"As a guarantee for the fulfillment of the obligations contained in this bond, the government of Peru, under the national faith, pledges the general revenue of the Republic, and especially the free proceeds of the guano in Europe and America, after the engagements which it has contracted on them are covered, the proceeds from the railways from Aregugua to Puno, etc., and the free revenue of the working thereof, and the receipts of the custom houses of the nation."

Vice-Chancellor Hall said in his opinion, that:

"I need not say that in this case an action upon the bond against the republic of Peru for recovering from the republic the amount of the bonds, is entirely out of the question. No such action as that could be maintained."

Again:

"Then considering that as the original position of each of the plaintiffs, what is there beyond which it is important to consider? There is a prospectus set out upon the faith of which the plaintiff says he subscribed."

Again:

"The bondholder, the person who has the benefit of this engagement, is to go to the government and say, You have engaged that after certain payments have been made, you will, out of what may be in your hands applicable for the purpose, set aside a sum sufficient for the service out of it."

Again:

"It is not sent to them as a fund to be treated and set apart and dealt with as a fund in their hands, so as to create any relation whatever between them and the bondholders. There

is no trust impressed upon it, no equitable assignment created by the transaction which is there represented, taking it to be truly represented; therefore, that being so, there is neither trust nor equitable assignment in the case, and it does not even approach the case of Gladstone against Musurus Bey, where there was a sum actually deposited by actual contract for a special and particular purpose between the parties, and which sum the Court thought it could deal with."

Upon appeal, the Master of the Rolls said:

"How can any rational person call that a mortgage or pledge which is preceded by the right of the pledgor to appropriate as much of the property as he pleases to any purpose he thinks desirable for his own use. It is impossible to look upon that seriously as a pledge. It is so much as the government chooses to leave them after satisfying the ordinary engagements and wants of the government."

The case of the Parlement Belge has been cited with great emphasis. But the following extract from the opinion of the Judges of Appeal in the case shows, that it does not help the defendants:

"We are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is a correct exposition of the law of nations, namely: that as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or *over the public property of any state which is destined to its public use*, or over the property of any ambassador, though said sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

In the case of Gladstone against Musurus Bey before Vice Chancellor Page Wood (1 H. and M., 495) an injunction was granted to restrain the Bank of England from parting with funds claimed to belong to the Sultan of Turkey. In the course of his opinion, the Vice-Chancellor said:

"If the bonds were the absolute unqualified property of the Sultan, that is to say, of the Turkish government, there might be some difficulty in attempting to enforce any claim against the Sultan by attaching this fund. You cannot proceed against the Sultan's property by way of arrest, so as to bring the sovereign within the juris-

diction of the court, or by way of execution or the like ; but that it not what this bill asks. The shape in which the case is put by the bill is that this property, in the eye of the court, is not the property of the Sultan ; that it is a fund *in medio*, which is in one contingent event to become the Sultan's property, and in another contingency to become the plaintiff's ; that it is, therefore, a fund in which both the Sultan and they have contingent interests. It is in effect exactly analogous to the case put by Lord Langdale in his judgment in Duke of Brunswick against King of Hanover, 6 Beavan, 39, though arising in a different form."

In Morgan against Lariviere, 7 H. L., 423, where the question was whether a banker's letter of credit created a trust, it was stated by the Lord Chancellor Cairns, p. 430, that

"No doubt, under such circumstances, the court having a trust fund under its control might well proceed to administer that fund, even though a foreign government might be interested in it, and might not be before the court, or subject to the jurisdiction of the court."

And again at page 432 :

"What is there in this letter which constitutes an equitable assigment, or what is there in it which impresses with a trust any particular sum of money ?"

In the case of the Charkieh, L. R. 4 A. & E., 59, which was a case of collision between a Dutch ship and a vessel of the Khedive of Egypt, it was held that the Khedive was not entitled to the privilege of a sovereign prince, and that "on the assumption that he is entitled to such privilege it would not oust the jurisdiction of this court in the particular proceeding which has been instituted against this ship."

Sir Robert Phillimore, in the course of his judgment, referred to two decisions of Judge Storey, reported in Sumner, and made this observation, page 93 :

"I think, therefore, that I am not prevented from holding what it appears to me the justice of the case would otherwise require, that proceedings of this kind *in rem* may in some cases at least be instituted without any violation of international law, though the owner of the *res* be in the category of persons privileged from personal suit."

Then again, on page 97 :

"The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just de-

mand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state; and, if the suit takes a shape which avoids the inconvenience, the object both of international and of ordinary law is attained—of the former, by respecting the personal dignity and convenience of the sovereign; of the latter, by the administration of justice to the subject."

According to this decision it is not improbable that a suit against one of our states would be entertained in an English court, and its property seized and sold.

The principle sought to be deduced from the English cases is: First, That a sovereign cannot be coerced even to the fulfillment of his engagements, and, as a corrolary therefrom, that his property cannot be taken from him by legal process. The principle is not applicable to the present American case, for three reasons: first, because an American state *can* be coerced at the suit of a proper plaintiff; secondly, because the property of an American state can be taken from it at the suit of any plaintiff, if he establishes his right to the property, and the state cannot be made a defendant; and thirdly, because as it respects the fund already collected by the Board of Liquidation (being the proceeds of the five and one-half mills tax), it is not the public property of the State of Louisiana, but the private property of the bondholders; and as it respects the fund that may be hereinafter collected by the same board, it is collectable from citizens of Louisiana, not by the exercise of new legislation, but just as if after the passage of the funding statute and ordinance of 1874, and the appointment of the Board of Liquidation, the legislature and the convention had adjourned for forty years.

The distinction sometimes taken between coercing a defendant as a private person and not as a state officer, savors too much of the dielectics of the schoolmen. There never yet was a mandamus issued to a defendant to assess and collect a tax, but it was is-

sued to him as an officer of a state. Mr. Madison was proceeded against as Secretary of State of the United States, and not as a citizen of Virginia. Mr. Kendall was proceeded against, not as Amos Kendall, but as Postmaster-General. In McComb's case, the injunction was granted against the defendants, not as individuals, but as the Board of Liquidation of the State of Louisiana.

The case of McCauley against Kellogg, decided by Mr. Justice Woods, is consistent with these principles. It was a suit in equity by a private person against officers of the state to compel them to "execute the statutes of the state by estimating, levying, collecting and applying to the payment of the bonds the tax originally provided by law for the payment of the interest, and the redemption of the principal." The act under which this injunction was asked had provided, that "the auditor of public accounts should, at the end of each year, estimate what sum levied upon the entire taxable property of the state would be sufficient to pay the interest on all bonds issued by the state, and that the sum so ascertained was thereby annually levied upon the taxable property of the state; that the tax so levied should be collected as other taxes, and should be known as the "Interest Tax," and when paid into the treasury should be credited to a fund to be called the "Interest Tax Fund," and should be held sacred for the payment of the interest upon the bonds of the state." This act had been repealed by the funding act and ordinance of 1874, which, it was claimed, were void.

The learned counsel does not intend, I am sure, to make an apology for repudiation, but then I would ask, why gather together and present to the court the records of the frauds of by-gone ages, the instances of debased coin, the abuse of paper money convertible into coin only at an enormous depreciation, and the open repudiation of the most solemn obligations? As well recount all the cruelties of the ancients or of the middle ages, the pillage of Magdeburg, the ravage of the Palatinate, the

butcheries of Cordova, the massacre of St. Bartholomew, the storming of San Sebastian, as an excuse for barbarities of to-day.

A successful and triumphant fraud, bad and cruel as it may be in its direct consequences, is made worse by its evil example. To teach the people of a country that a state may enter into the most sacred engagements and yet flout them with impunity in the face of its creditors, is to teach them that dishonesty, to be profitable, needs only to be powerful. With such a lesson and such an example, how can the citizen be expected to practice the virtue which the state teaches him to disdain? What should he think of the sanctity of laws when the lawgiver breaks them at will? What will he think of honesty when his state teaches him dishonesty?

We do not sufficiently reflect on the disturbing elements of repudiation. In this busy and practical age, when public securities flood the land and everybody deals in them, there will be agitation, discontent and struggle, until it is finally decided, that for the monstrous and shameless wrong of repudiation there is an effectual remedy. Slavery was a disturbing element which had to be put down before we could have peace. So must repudiation be put down, or it will put us down.

The learned counsel finds fault, not only with New York and her citizens, for daring to ask for the payment of their dues, but with former judgments of this court, and, as it should seem, even with the constitution itself. The prohibition to legislate in such manner as to impair contracts is slightingly spoken of; the decision in Chisolm's case is sneered at, and the opinions of the Judges are characterized as "mistaken and erroneous," and it is said that "one cannot read them now without wonder that they could have been conceived."

Of the state and citizens of New York, seeking here to recover only what the state of Louisiana has solemnly pledged herself to pay, it was scarcely

possible to write or speak, in terms of greater disparagement, than the learned counsel has written in his briefs and spoken in his oral argument. Plutocrats, hucksters, jobbers in stocks and securities, champertors, chevaliers d'industrie, are some of the epithets heaped upon the holders of Louisiana bonds. And of the sovereign states of New York and New Hampshire, which have always paid their debts and obeyed the constitution, which have never been dishonest or disloyal, which won their independence with the sword, and greatly helped to establish this union of the states, when Louisiana was a feeble vassal of Spain, and a score of years before it was sold to us; of these states the following language has been thought befitting:

"Heresy, schism, apostacy, blasphemy, and infidel publications are wolfish. The inquisition, the rack, the *auto da fé*, are methods of indirect action. New York and New Hampshire seem to have attained to a full appreciation of the latent forces to be found in indirect action and to a purpose to employ it. They seem determined to collect into their fold their unsuspecting and fearful lambs from their innocent and delightsome pasturage within the stock exchanges which abound in those states."

One who could have seen, as I saw, the late chief Justice of this court, then secretary of the treasury, pleading with the merchants and capitalists of New York for the loan of their money to the government upon its bonds, to aid in putting down the rebellion, and the prompt, unselfish, generous way in which they answered his call, would never think of calling the lenders of money to a government in its distress, plutocrats, hucksters, jobbers in stocks and bonds, chevaliers d'industrie. He would have thought and said that they who thus aided the government with their treasure, poured out with lavish hands, at the risk of losing all if the great cause failed, were to be, not cursed, but thanked, by the side of that "army with banners," which carried us so bravely through. Is it not possible that they who lent money to Louisiana had some generous thoughts, and were moved by credit-

able motives? Is it incredible, that they who in the markets and exchanges of the world deal in the stocks and bonds of governments are endowed with honorable sentiments in as great measure as the sugar-planters, rice-growers, and field-laborers of Louisiana?

I cannot close this argument without adverting to the moral aspects of the case; not that I would have it judged by any other test than that of the constitution and the laws, but that I invoke the spirit of the constitution as its best interpreter. This great compact is instinct with good faith. That is the breath of its life. The citizens are taught to lean on and confide in each other. None know better than you, our judges, before whom is spread the history of the law, not less than its precepts, what a shock an open, defiant, triumphant repudiation, by one of our states, of its solemn engagements, must give to our whole moral, social, political and legal system. The states are bound together by ties that can never be broken. If one bears a tainted name or the memory of evil deeds, she will harm the good name of all the rest. Her example is an invitation to every one of her own citizens, and indeed to the citizens of all to do likewise: to deceive, to cheat and to betray.

The great tribune of England described faith as that which "holds the moral elements of the world together." It holds them, as the law of gravitation holds the physical elements, without which there would be universal chaos. The absence of faith is the disintegration of society: an approach to that period when the nearer one gets to his neighbor, the more he wishes to get away from him; when the worst foes of a man are those of his own household, even the wife of his bosom and the children of his loins.

I appeal to you, judges of the land, pre-eminent in dignity, in honor and in power; I appeal to every lover of his country; to every true son of Louisiana, and there must be many such, though overborne for the moment by an ignorant and thievish multitude;

I appeal to the learned counsel himself, who, I am sure, abhors in his inmost heart, the perfidy which he is obliged to defend ; I appeal to all, to lead us out of this valley of humiliation, to help us blot this ordinance of repudiation and shame from the book of the laws of Louisiana, from the pages of history, and from the memory of men.

Appendix.

No. 1.

THE CONTRACT.

STATUTE, ORDINANCE, BOND AND COUPON.

a. STATUTE.

AN ACT to provide for funding obligations of the state by exchange for bonds; to provide for principal and interest of said bonds; to establish a board of liquidation; to authorize certain judicial proceedings against it; to define and punish violations of this act; to prohibit certain officers diverting funds except as provided by law, and to punish violations therefor; to levy a continuing tax and provide a continuing appropriation for said bonds; to make a contract between the state and holders of said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the state and to limit state taxes; to annul certain grants of state aid; to prohibit the modification, novation or extension of any contract heretofore made for state aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That for the purpose of consolidating and reducing the floating and bonded debt of the state, the governor, lieutenant governor, auditor,

treasurer, secretary of state, and speaker of the house of representatives are hereby authorized to cause to be prepared, and to issue bonds, to be known as "consolidated bonds of the state of Louisiana," of the denominations of one hundred, five hundred and one thousand dollars, to the amount of fifteen millions of dollars, or so much thereof as may be necessary, all payable forty years from the first day of January, 1874, and all to be numbered consecutively, and made payable to bearer, and to bear interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York and city of New Orleans, on the first day of July and January of each year, and coupons for such interest shall be annexed thereto; said interest and principal to be payable in lawful money of the United States.

SEC. 2. *Be it further enacted, etc.*, That the parties designated in the foregoing section shall constitute a board of liquidation, and a majority of said board shall elect a fiscal agent for the state, who shall be a member of said board.

SEC. 3. *Be it further enacted, etc.*, That the bonds authorized by section one shall be signed by the governor, auditor and secretary of state, and the coupons shall be signed by the auditor and treasurer; and when so prepared said bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the state, and all valid warrants drawn previous to the passage of this act by the respective auditors of public accounts of the state on the treasurer thereof, except warrants issued by the auditor in payment of the constitutional officers of the state, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants; *provided*, that the holder of any bond or valid warrant rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided by this act; *and provided further*, that if any member of said board of liquidation shall knowingly audit and fund any illegal claim against the state, he shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined not less than five thousand dollars and be imprisoned not less than two years, at the discretion of the court. And any person knowingly procuring the same to be done shall be subject to the same penalty

SEC. 4. *Be it further enacted, etc.*, That the exchange of the bonds or valid warrants authorized by this act shall be effected by said board of liquidation in the cities of New Orleans and New York.

SEC. 5. *Be it further enacted, etc.*, That the consolidated bonds herein authorized shall be held and used by said board of liquidation only for the purpose of exchange as aforesaid; said bonds shall be used for no other purpose or purposes than as authorized by this act and any member of the board of liquidation using or attempting to use, or attempting to induce any person or persons to use said bonds, or any of them, for any other purpose or purposes shall, on conviction thereof, be punished by a fine of not less than five thousand

dollars, and by imprisonment at hard labor for not less than one year.

SEC. 6. *Be it further enacted, etc.*, That notice of the adoption of this act shall be published by said board in one or more journals of New Orleans, New York, London, Paris and Amsterdam.

SEC. 7. *Be it further enacted, etc.*, That a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the state is hereby annually levied, and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose, and no other. And that it shall be deemed a felony for the fiscal agent or any officer of the state, or board of liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years nor less than two, at the discretion of the court. If there shall, during any year, be a surplus arising from said tax after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchase to be made by the said board of liquidation, from the lowest offers, after due notice; *provided*, that the total tax for interest and all other state purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and innterest; and the said appropriation shall be a continual annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the auditor and treasurer, and the said board respectively, to collect said tax annually, and pay said interest and redeem the said bonds until the same shall be fully discharged.

SEC. 8. *Be it further enacted, etc.*, That the bonds and valid warrants outstanding at the time of the passage of this act, shall as fast as they are received in exchange for consolidated bonds be cancelled and destroyed by the said board of liquidation, and consolidated bonds purchased as provided for in section seven of this act, shall be canceled and destroyed after public notice has been given of the same in the official journal of the state, in the presence of as many citizens as may desire to be present, in like manner, and within ten days after such destruction, in each case, a *proces verbal* of the same shall be published and a report made to the general assembly on the first Monday of every year, by said board.

SEC. 9.—*Be it further enacted, etc.*, That it shall be the duty of the auditor in his next annual report to give a detailed account of the proceedings had under this act, including the amount of new bonds issued, the amount of old bonds and valid warrants canceled, the amount of the same outstanding, and the cost of the exchange, and annually thereafter a full and exact statement of the condition of the public debt under the operations of this act.

SEC. 10.—*Be it further enacted, etc.*, That any judge, tax collector, or any officer of the state obstructing the execution of this act, or any part of it, or failing to perform his official duty thereunder, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment not exceeding five years, and by fine not exceeding two thousand dollars, at the discretion of the court; *provided*, that this section shall in no wise prejudice or affect the criminal proceeding under section five of this act.

SEC. 11.—*Be it further enacted, etc.*, That each provision of this act shall be, and is hereby declared to be, a contract between the state of Louisiana, and each and every holder of the bonds issued under this act.

SEC. 12.—*Be it further enacted, etc.*, That all grants of state aid heretofore made, whether of bonds, indorsements, subscriptions of stock, or otherwise, which have become lapsed or forfeited, be and the same are hereby repealed and annulled, nor shall the state hereafter modify, novate, or extend any contract heretofore made for the giving of state aid in any form or under any pretext.

SEC. 13.—*Be it further enacted, etc.*, That the entire state debt prior to the year of our Lord nineteen hundred and fourteen shall never be increased, directly or indirectly, beyond the sum of fifteen millions of dollars hereby authorized, it being the intent and object of this act, and of the exchanges to be effected thereunder, to reduce and restrict the whole indebtedness of the state to a sum not exceeding fifteen millions of dollars, and to agree with the holders of the consolidated bonds to be issued hereunder that said indebtedness shall not be increased beyond said sum during said period.

SEC 14.—*Be it further enacted, etc.*, That any tax collector who shall turn over any money or warrants by him collected to any person except to the state treasurer, shall be deemed guilty of a misdemeanor, and shall, on conviction, be subject to the penalties prescribed in section ten of this act, and shall in addition thereto be liable in damages in double the amount so turned over; and any state officer requiring or demanding that said taxes shall be turned over to him, except the treasurer of the state, shall be deemed guilty of a misdemeanor, and shall, on conviction, be subject to the penalties prescribed in section ten of this act, and shall in addition thereto be liable in damages in double the amount so turned over; and any state officer requiring or demanding that said taxes shall be turned over to him, except the treasurer of the state, shall be liable, on conviction, to the same penalties as are prescribed in this section.

SEC. 15. *Be it further enacted, etc.*, That from and after the passage of this act until the first day of July, 1874, all valid auditor's warrants issued for debts due prior to January 1, 1874, shall be received for all back taxes, licenses and interest and penalties thereon, due prior to said first of January, 1874, except two mills for school fund, three mills for levee construction and repair fund, and two

mills to the interest fund for the purpose of paying any interest in arrears accruing on the bonded debt of the state prior to the passage of this act.

SEC. 16. *Be it further enacted, etc.*, That no court, or judge thereof, shall have power to enjoin the payment of principal or interest of any bond issued under this act, or the collection of the special tax therefor, or to enjoin any officer of state or parish in receiving warrants, as is prescribed in section fifteen of this act.

SEC. 17. *Be it further enacted, etc.*, That all acts or parts of acts in conflict with this act, or any section thereof, are hereby declared to be repealed, and that this act shall take effect from and after its passage.

b. CONSTITUTIONAL ORDINANCE.

No. 1. The issue of consolidated bonds, authorized by the general assembly of the state, at its regular session in the year 1874, is hereby declared to create a valid contract between the state and each and every holder of said bonds, which the state shall by no means and in no wise impair. The said bonds shall be a valid obligation of the state in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year, until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the state to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasurer.

No. 2. Whenever the debt of the state shall have been reduced below twenty-five million dollars, the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased; and this rule continue in operation until the debt is reduced to fifteen million dollars, beyond which it shall not be increased, nor shall taxation for all state purposes, excepting the support of public schools, ever exceed twelve and a half mills on the dollar of the assessed valuation of the real and personal property in the state, except in case of war or invasion.

No. 3. The revenue of each year derived from taxation upon real, personal and mixed property, or from licenses, shall be devoted

solely to the expenses of the said year for which it shall be raised, excepting any surplus remain, which shall be directed to sinking the public debt. All appropriations and claims in excess of revenue shall be null and void, and the state shall in no manner provide for their payment.

c. BOND.

UNITED STATES OF AMERICA.

1,000. No. 7794.] [No. 7794. 1,000

M.] *Consolidated Bond of the State of Louisiana.* [*M.*

The state of Louisiana by these presents hereby acknowledges itself indebted to the bearer in the sum of one thousand dollars, which sum it promises to pay in lawful money of the United States, at the office of the state treasurer, in the city of New Orleans, state of Louisiana, on demand after the first day of January, A. D., one thousand nine hundred and fourteen, with interest at the rate of seven per cent. per annum, payable semi-annually, in lawful money of the United States, at the office of the state treasurer, city of New Orleans, state of Louisiana, or at the office of the fiscal agent of the state of Louisiana in the city of New York, state of New York, on the first day of July and January of each year upon the surrender of the coupons hereto annexed as they shall become due. This bond issued under authority of, and in conformity with, an act of the general assembly of the state of Louisiana, approved January 24th, 1874, being act No. 3 of the session of 1874. In testimony whereof, the governor, auditor and secretary of state of the state of Louisiana, under the seal of the state, have signed these presents, bearing date this first day of January, A. D., one thousand eight hundred and seventy-four, in conformity with the provisions of the aforesaid act.

WM. P. KELLOGG.
Governor of the State of Louisiana.

E. B. JOHNSON,
Auditor of Public Accounts.

[SEAL] P. G. DESLONDE,
Secretary of State.

(Indorsed:) No. 7794. United States of America, state of Louisiana. Consol. $1,000. Under authority of an act of the genera assembly, approved January 24th, 1874. Principal and interest payable in lawful money of the United States. Principal due first day

of January, A. D., 1914. Interest at seven per cent. payable on the first day of July and January of each year in New Orleans or New York, at the option of the holder.

The payment of the principal and interest of this bond is provided for by the levy of an annual tax fixed and guaranteed by the constitution of the state, and not repealable by legislative enactment

State debt limited to $15,000,000, and taxes for all purposes except for schools limited to 12½ mills by the constitution of the state.

d. COUPON.

$35.] *Consolidated Bond.—Act of Jan'y 24th*, 1874. [$35.

The state of Louisiana will pay the bearer on the first day of Jan'y, 1881, thirty-five dollars, in lawful money of the United States, in New Orleans or New York, at the option of the holder, being six months' interest on the consolidated bond No. 7794. Coupon No. 14.

CHAS. CLINTON, *Auditor*. A'NE DUBUCLET, *Treasurer*

No. 2.

THE REPUDIATION.

ART. 1. *Be it ordained by the people of the State of Louisiana, in convention assembled*, That the interest to be paid on the consolidated bonds of the state of Louisiana be and is hereby fixed at two per cent. per annum for five years from the first of January, 1880, three per cent. per annum for fifteen years and four per cent. per annum thereafter, payable semi-annually; and there shall be levied an annual tax sufficient for the full payment of said interest, not exceeding three mills, the limit of all state tax being hereby fixed at six millions; *provided*, the holders of consolidated bonds may, at their

option, demand in exchange for the bonds held by them, bonds of the denomination of five dollars, one hundred dollars, five hundred dollars, one thousand dollars, to be issued at the rate of seventy-five cents on the dollar of bonds held and to be surrendered by such holders, the said new issue to bear interest at the rate of four per cent. per annum, payable semi-annually.

ART. 2. The holders of consolidated bonds may at any time present their bonds to the treasurer of the state, or to an agent to be appointed by the governor—one in the city of New York and the other in the city of London—and the said treasurer or agent, as the case may be, shall indorse or stamp thereon the words "interest reduced to two per cent. per annum for five years from January 1st, 1880, three per cent. per annum for fifteen years, and four per cent. per annum thereafter;" *provided*, the holder or holders of said bonds may apply to the treasurer for an exchange of bonds, as provided in the preceding article.

ART. 3. *Be it further ordained*, that the coupon of said consolidated bonds falling due the first of January, 1880, be and the same is hereby remitted, and any interest taxes, collected to meet said coupon *are hereby transferred* to defray the expenses of the state government.

10-8-76

OFFICE SUPREME COURT U.S.
FILED
OCT 10 1882
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the U. S.

APRIL, 1882.

THE STATE OF NEW HAMPSHIRE, No. 4,
THE STATE OF NEW YORK, No. 6,
JOHN ELLIOTT, ET AL., 2 CASES, 845, 846.

vs.

THE STATE OF LOUISIANA AND HER EXECUTIVE OFFICERS.

ARGUMENT OF JOHN A. CAMPBELL,

Of Counsel for Defendants.

JOHN A. CAMPBELL,
Of Counsel for Defendants.

J. C. EGAN,
Attorney General, Louisiana.

J. MURPHY & CO., PRINTERS AND STATIONERS, BALTO.

Supreme Court of the United States.

17th April, 1882.

THE STATE OF NEW HAMPSHIRE, No. 4.
THE STATE OF NEW YORK, No. 6.
JOHN ELLIOTT, ET AL., 2 *Cases*, 845, 846.

vs.

THE STATE OF LOUISIANA AND HER EXECUTIVE OFFICERS.

Argument of JOHN A. CAMPBELL, of Counsel for the Defendants.

May it please the Court:

Four cases have been set down for argument and for judgment at this time under the order of this Court. On the part of the plaintiffs in all of these there is a demand that the State of Louisiana is their debtor upon written evidence of indebtment of the same import arising out of the same contract, and for the payment of these debts money has been collected by the State and is in her treasury applicable to that payment. They ask of the Court judgments or decrees to require the payment to be made from the money in the treasury and to affirm the validity and binding operation of their demand.

Two of these suits were commenced in this Court by the States of New Hampshire and New York against the State of Louisiana and her executive officers. The remaining two were commenced by individuals in the Circuit Court of the United States at New

Orleans against the executive officers of the State, the State not being a party. The plaintiffs in these cases have the same cause of suit supported by similar evidence and demand a decree for compulsory payment from the same fund deposited in the treasury.

They demand payment of coupons of interest due in January, 1880, which were detached from bonds issued by the State. The primary question in all of the cases is, does the judicial power of the United States as vested in their Courts extend to the allowance of the demands of these parties?

It was asserted shortly after the organization of the Court that any individual belonging to any State of the Union or any subject of a foreign State, might maintain a suit here against any State of the Union, of which he was not a citizen. Several suits were brought in the Court by citizens and by aliens against States. The case of Chisholm vs. Georgia, 2 Dall., 419, was argued upon a protest of Georgia against the jurisdiction. The suit was for goods sold and delivered to persons who are called in the pleadings agents of the State, for account of the State in the year 1777. Another case was brought by aliens and citizens against Virginia founded upon an old grant issued by the King of Great Britain at an early period for lands in the western part of Virginia. The Court announced a judgment in favor of the jurisdiction of the Court in the early part of the year 1793.

In the summer of that year Wm. Vassall commenced a suit against Massachusetts and the subpœna in chancery was served upon the Governor—John Hancock. The Governor convened the General Court of the State to obtain their counsel and directions. He submitted the process and the opinions given in the case of Chisholm by the Justices of this Court and he addressed the General Court and among other matters said: "When the Constitution of the United States was proposed to the people's consideration he then was and was still impressed with the necessity of a more perfect union of the States than at that time existed, and

therefore exerted the share of influence which he possessed in favor of its being adopted. He then considered it as being by no means explicit in the description of the powers intended to be delegated but trusted that the wisdom of the people would very soon render every part of it definite and certain. The idea that it is dangerous to examine systems of government, and to compare the effect produced by their administration with the principles on which they were raised, is inadmissible among a free people. If the people are capable of practicing on a free government, they are able without disorders or convulsions to examine, alter, and amend the systems which they have ordained. And it is of great consequence to the freedom of a nation to review its civil constitution, and to compare the practice under it with the principle on which it depends. The tendency of every measure, and the effect of every precedent ought to be scrupulously attended to, and critically examined. This is the business of the people and can never be by them entrusted to any other persons. A consolidation of all the States into one government would at once endanger the nation as a Republic and eventually divide the States united or eradicate the principles which we have contended for. It is much less hazardous to prevent the establishment of a dangerous precedent than to attempt the abolition of it after it has a place in a civil institution. Your fellow-citizens anxiously await the event of your deliberations on the important business before you."

This extract from the speech of Governor Hancock illustrates the enlarged catholic and unselfish spirit in which this movement was commenced, and the counsels of that statesman are delivered with singular felicity and grace.

After a fortnight spent in deliberation, the General Court returned to their chief magistrate the following resolutions and address as the result:

"FRIDAY, *September 27th, 1793.*

"*In Senate.* WHEREAS, a decision has been had in the Supreme Judicial Court of the United States, that a state may be sued in

the said Court, by a citizen of another State, which decision appears to have been grounded on the second section of the third Article in the Constitution of the United States.

"*Resolved*, That a power claimed, or which may be claimed of compelling a State to be made defendant in any Court of the United States at the suit of an individual or individuals, is in the opinion of this Legislature unnecessary and inexpedient—and in its exercise, dangerous to the peace, safety and independence of the several States, and repugnant to the first principles of a Federal Government.

"*Therefore resolved*, That the Senators from this State in the Congress of the United States be, and they hereby are instructed, and the Representatives requested to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States, as will remove any clause or article of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.

"And his Excellency the Governor is hereby requested to communicate the foregoing Resolves to the Supreme Executives of the several States to be submitted to the consideration of their respective Legislatures."

"*To his Excellency* JOHN HANCOCK, *Esq., Governor of the Commonwealth of Massachusetts.*

"*May it please your Excellency.*

"The resolution adopted upon the subject on which the Legislature has been convened, will convince your Excellency how justly we appreciate the vigilance and propriety of your conduct on this interesting occasion.

"With respect to the suit of William Vassall against the Commonwealth no answer will be made,—but at the same time,

it may not be improper to observe, that if he shall exhibit to the Legislature, an equitable claim against the commonwealth, in the manner heretofore practiced, justice will be extended to him, in common with all others.

"The Legislature need only add, Sir, that they earnestly wish for the happy recovery and re-establishment of your Excellency's health, as a relief and comfort to your friends, and a blessing to your country."

The Governor died a few days after these were received by him, and with his office the duty was devolved on Samuel Adams, Lieutenant-Governor, to communicate them to the other States of the Union. This he did in a letter which I have not been able to procure, but which I remember to have read in print and which expressed a hearty concurrence in the result.

In the autumn of the same year the Legislature of Virginia responded in a resolution expressive of an *unanimous approval* of the conclusions expressed by Massachusetts and concurring in her recommendation.

"*Resolved*, That a State cannot under the Constitution of the United States, be made a defendant at the suit of any individual or individuals, and that the decision of the Supreme Federal Court, that a State may be placed in that situation, is incompatible with and dangerous to the sovereignty and independence of the individual States, as the same tends to a general consolidation of these confederated republics.

"*Resolved unanimously*, That the Senators representing this State in the senate of the United States, be and they are hereby instructed, and the Representatives requested to unite their utmost and earliest exertions with the Senators and Representatives from other States coinciding in sentiment with this State to obtain such amendments in the Constitution of the United States as will remove or explain any clause or article of the said

Constitution which can be construed to imply or justify a decision, that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States; and that the Governor is hereby requested to communicate the foregoing resolve to the Supreme Executives of the several States to be submitted to the consideration of their respective Legislatures. This was agreed to by the Senate, on December 3d, 1795. This Act of the Legislature is reported in Statutes-at-Large, Vol. 1st, 1792 to 1795, page 284."

We have not found any declaration by the State of Georgia at this stage of the procedure, of her discontent, nor of angry opposition. She adopted the amendment as declarative of the meaning of the Constitution and as indicative of the only meaning it could have consistently with the rights and dignity of the States. In 1794, a resolution framed upon the resolutions of Massachusetts was offered to the Senate by one of her senators, (Caleb Strong), for the incorporation into the Constitution of an article which became the 11th Amendment of the Constitution; the resolution was adopted as offered, without any change, by a vote approaching to unamimity. I have referred in my brief to the proceedings of Congress and to the weight of the Senators and Representatives who agreed in its support. I have done this for the reason that in some of the opinions delivered in this Court in the past time, allusions to this history and to the cause of this amendment have been made which I do not agree to, as an exact interpretation of the history and as calculated to undervalue the force of the movement. I am not able to find anything which diminishes in any manner the magnanimous, constitutional and patriotic bearing of Hancock and Adams, or the wisdom, counsel and sobriety of the General Court, nor which denotes the absence of similar characteristics and qualities from the Legislatures or the Congress which adopted the amendment as a part of the supreme law of this

land, or that proves their motives to be other than they have declared.

Before the Constitution had been ratified, and while it was under discussion, Hamilton, in a number of the Federalist, examined the Constitution to find its meaning on the subject. An extract from the number is copied into the brief, and contains all that can be wanted on the subject. Brief, p. 12. I will read it: —

"After the submission of the Constitution to the States for adoption, there were apprehensions or suggestions expressed, which are noticed in the 81st number of the Federalist, prepared by Hamilton. 'I take occasion to mention,' he says, 'a *supposition* which has excited alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another State would enable them to prosecute that State in the Federal Court for the amount of those securities—a suggestion which the following considerations prove to be without foundation. It is in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind.

"'And the exemption as one of the attributes of sovereignty is now enjoyed by the government of every State of the Union.

"'Unless therefore there is a surrender of the immunity in the plan of the convention, it will remain with the States and the danger intimated will be ideal. The circumstances which are necessary were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles then established will satisfy us that there is no color to pretend that the State governments would, by the adoption of the plan, be divested of the privilege of paying their debts in their own way, free from any constraint but that which flows from the obligations of good faith. The contracts between a nation and

individuals are only binding on the conscience of the sovereign and have no pretence to a compulsive force. They convey no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State. And to ascribe to the Federal Courts, by mere implication and in destruction of a preëxisting right of the State government, a power which would involve such consequences would be altogether forced and unwarrantable.'—*Federalist*, No. 81."

The Convention of New York had recommended an amendment which corresponds very nearly to the 11th Amendment and which had the vote of Hamilton and Livingston. The debates in the Virginia Convention have been reported with more care than those of any other Convention. The judiciary clause was examined severely by the opponents of ratification. The debate is interesting as containing the opinions of her most prominent actors in the work of framing the Constitution.

"George Mason and Patrick Henry afterwards made use of this suppositious case with power in the Virginia convention. Referring to the clause, 'To controversies between a State and citizens of another State,' Mason asked, 'how will jurisdiction in this case do? Let gentlemen look to the westward. Claims respecting those lands, every liquidated account, or other claim against this State will be tried before a Federal Court. Is this not disgraceful? Is this State to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the State to be arraigned like a culprit or private offender? I think this is perfectly unnecessary.'

"3 Ell. Deb., 480, (1st edition.)

"Patrick Henry reinforced Mason with his vehement invective and eloquence, and concluded a reply to Madison by the remark:

'It would ease my (his) mind if the honorable gentlemen would tell me the manner in which money should be paid, if in a suit between a State and individuals the State were cast.

"'The honorable gentlemen perhaps does not mean to use coercion but some gentle caution. I shall give my voice for the federal cognizance only, where it will be for the public liberty and safety.'

"3 Ell. Deb., 493, (1st edition.)

"Madison replied: 'The federal jurisdiction in controversies between a State and citizens of another State had been much objected to, and perhaps without reason. It is not in the power of individuals to call any State into Court. The only operation the clause can have is that if a State should wish to bring suits against a citizen it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State Courts, * * * It appears to me that this clause can have no operation, but to give a citizen a right to be heard in a Federal Court; and if a State should condescend to be a party, this Court may take cognizance of it.'

"3 Ell. Deb., 485–6."

"Marshall replied to the objections. He said: 'with respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of a Federal Court. It is not rational to suppose that the sovereign power shall be dragged before a Federal Court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. I see a difficulty in making a State defendant which does not prevent it being plaintiff.' 3 Ell. Deb., 504–5 17 How., 518."

The effect of the 11th Amendment to the Constitution upon the cases then pending in the Court, was announced by the Court in Hollingsworth vs. Virginia, 3 Dall., 378, after argument. It was contended in argument that it was prospective and did not operate upon any suit on the docket. It was argued to the contrary, that "the amendment was explanatory in substance as well as in language. * * * It was the policy of the People to cut off that branch of jurisdiction which had been supposed to authorize suits of individuals against States." The unanimous opinion of this Court was: "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of a foreign State." The Reporter concludes his second volume with the statement "that all the suits against States were *swept* at once from the records of the Court by the amendment to the Federal Constitution, agreeably to the unanimous opinion of the Judges. 2 Dall., 480, (note). There never was a trial of any one of the cases commenced against States, nor do we find any appearance entered for them, nor plea nor answer filed, nor any final order rendered in any. They sunk silently from the Court like lead into the mighty waters. From this date of 1798 no State of the Union was summoned to the bar of this Court for a quarter of a century for any cause; or by any suitor under a claim of original jurisdiction. The case of New Jersey vs. New York, 5 P., 284, was the first instance. There seemed to have been an opinion in Congress and among the States that jurisdiction had not been conferred upon this Court to determine controversies arising between States by any act of Congress, and the judicial power of the United States had not been delegated in such cases to the Court. In 1814 the State of Kentucky addressed a memorial to Congress to legislate on the subject so that a disputed boundary might be settled with Tennessee. This application was renewed from time to time, and in 1819

there was an animated debate in the Senate in which Mr. Crittenden participated. The bill he supported was rejected. The debate showed an indisposition to confer the power from a dread of consequences, and that an urgent case must arise for the grant of the power. The opinion was that the delegation of such a power would be fraught with mischief. In 1822 this discussion was renewed upon a bill introduced by senators from New Jersey to allow of a suit with New York, but which was general in its application, in respect to property and jurisdiction in the waters of the Bay of New York. A summary of the debate is reported in the Annals of Congress. The Senate proceeded to the consideration of the bill introduced by Mr. Dickinson prescribing the mode of commencing and deciding controversies between States. Mr. Dickinson delivered an argument of considerable length in support of the bill for the purpose of showing the expediency of the measure, and entering a good deal into the merits of the controversy concerning boundary and the extent of their respective jurisdictions. Mr. Van Buren also entered at large into the merits of the controversy and argued there was no necessity for adopting this bill inasmuch as the question between the States could without any such law, be brought up into Court, the same as between individuals. The next day, Mr. Rufus King of New York, spoke at considerable length to show that the bill was unnecessary, inexpedient and ought not to pass. Mr. Southard replied: Mr. Van Buren also again spoke. Mr. Barbour and Mr. Macon respectively without going into the merits of any particular controversy, submitted their reasons for disapproving of the bill, arguing chiefly that such a bill ought not to pass without some apparent necessity, and as its passage did not seem to be indispensable it would be impolitic as consequences might grow out of it of much political inconvenience. Mr. Dickinson in conclusion observed that although no vote had been taken, he had ascertained the opinion of a number of the members on it, and as the objection seemed to be the general nature of

the bill, he would move an amendment embracing the existing cause of dispute between New Jersey and New York. In the face of this definite, distinct and responsible opinion of Congress it was some years after discovered that the Court had acquired jurisdiction under the judiciary act of 1789, the process, act and the practice in the cases which had been disposed of by the 11th Amendment, 5 P. 284.

This statement of congressional action is submitted to the Court to repel any conclusion that the Constitution of the United States, which sanctions the employment of judicial power in controversies between two or more States was concerned with any expectation or purpose of conducting an experiment whereby wars, conquests, controversies, and disputes among nations might be reduced to the compass of a quiet, amicable and endearing suit before a civil tribunal.

The jurisdiction over such controversies was conferred upon the Congress of the Confederation under an overruling necessity. The Colonies were engaged in a perilous and unequal war at the time. There was not a colony which did not have a boundary unascertained and perhaps disputed. In several of the disputes there was anger, irritation, and a disposition to violence. The King in Council had exercised jurisdiction to arrange and settle these boundaries, though modern jurists question this prerogative, and these decisions were respected and obeyed. The differences of Massachusetts and New Hampshire, and of New Hampshire and New York, were so decided. The territory of Vermont was adjudged to New York, but the settlers deriving titles from New Hampshire refused obedience. New York relinquished her title for a small indemnity, and so Vermont became a State.

1 Sparks' Life of G. Morris, pp. 208–9, note.

Pennsylvania and Connecticut refer their dispute to Congress. The judgment was for Pensylvania, but the judgment was not accepted until Connecticut was compensated by a grant of territory in Ohio.

Virginia was relieved from controversy by ceding the North West territory to the United States, but Maryland had a dispute with her which was not adjusted until now. The dispute between Tennessee and Kentucky, was one that originated between North Carolina and Virginia; Georgia had boundaries to settle with South Carolina, Tennessee, and with Spain. The Confederation was substituted for the King and his Council to determine such differences, and the power conferred in this Court, the history of Constitution shows was another act of substitution. There is no serious discussion on the subject in the course of that history. When we consider the structure of the Constitution, the nature of the prohibitions of treaties, alliances, confederations, agreements, compacts, imposts and of all belligerent faculties, and the delegation to Congress of power over commerce, navigation and interstate relations as to fugitives from justice and service, and of the certification of laws and records, it must appear that a dominant purpose was that the controversies for arbitrament should be as few as possible. It would seem to follow that suits commenced and prosecuted by a State or States of the Union against other States in favor of the members of the States upon such invitations as New Hampshire and New York have extended, plainly contradict the aim and intent of the authors of the Constitution in the allowance of this power to the general government. A State enjoying an immunity from suit under the Constitution in every other case, except one of controversy between herself and another State, could not have conceived of a delegation to that other State an authority to find controversies, which she might abet or maintain for her pleasure or her profit. The grant made is not to the State nor for the State. The judicial power is delegated to the United States and for the general good. This judicial power is prohibited to the United States in respect to individuals, it is limited to controversies between States. Controversies immediate, direct, arising between the States.

The origin of the two suits, that of New Hampshire and that of New York, has been ascertained by the testimony taken in the suit. New Hampshire and New York have extended invitations by legislative acts to their citizens to make their assignments to the States, to arrange with the attorney general for the payment of costs and expenses so as to spare the treasuries of those States, and that he shall bring these suits or suffer them to be brought in the name of the State. The creditor is to be the sole beneficiary, the *dominus litis*. The constitutional order of this Court established by the supreme law of the land and the practice of the Court as framed to fulfil the Constitution, we have answered forbids suits thus commenced. The judgments of the Court establish that the government of the United States cannot enlarge the original jurisdiction of this Court.

The jurisdiction is defined and limited to cases *between* designated persons. The creative power of the States and people acting under the Constitution must be resorted to before any new class of suits can be heard here.

The Statutes of New Hampshire and New York have affected, so far, only three or four persons of those States who have accepted the terms of the invitation, and are substantially the plaintiffs in the two suits. Those States confessedly have no interest in the decrees to be made. Nor have the millions of inhabitants within their boundaries. The Court has determined that individuals who have no legal standing in the Court must not come by any covert or crooked paths into it. The Court is employed with subjects of jurisdiction of importance and difficulty by the assignment of the People of the United States, and no contempt can be more flagrant than that of States or individuals succeeding by artful contrivances to impose other subjects of jurisdiction upon the Court, and to which no judicial power in the land is applicable. The cases before the Court have been inducted to the Court by States strong in their population, wealth, resources, pride and passions, claiming to employ the judicial power of the Union, not for themselves, but for

individuals to whom they have delegated their name and their faculties for suit. New York, while engaged in the examination of the Constitution of the United States with the question of ratification to be decided, hesitated, and recommended as an addition "that the jurisdiction of the Supreme Court of the United States or of any other Court of the United States to be instituted by Congress, ought not, in any case, to be increased, enlarged or extended by any fiction, collusion, or mere suggestion."

This, and recommendations from other States, were submitted to the First Congress, and were examined for adoption. Many others, similar in their general design, to guard against abusive interpretations, were comprehended under the ninth and tenth amendments reported by the Committees of Congress and adopted by the Congress and the legislatures of the States.

The import of the Statute of New York in this record and of a similar act offered in the legislature of that State at a prior session, is that there is no harm in employing fiction, collusion, or suggestion to bring suits into this Court. When New York brought her bill into this Court with an averment that she was the owner, bearer and holder of bonds issued by Louisiana, there was FICTION. When she sent forth invitations to her citizens to bring their evidence of debt to her attorney general, and to make an assignment to her of the bonds or coupons, and that the attorney general should bring a suit or allow a suit to be brought in this Court in her name, and that the assignors might conduct the suit and bear the burden of costs and expenses, this was COLLUSION. When the Court is addressed with an argument that this is a rightful jurisdiction eminently proper to be exercised, this is *mere* SUGGESTION. This Court is habitually called on to observe the morality contained in the proposition of New York to amend the Constitution. The line it prescribes must be observed in the daily labors of the Court. The maintenance of the bounds of common law, equity, admiralty; the hindrance of appeals and writs of error that by Constitution

and Statute ought not to be heard in the Court; the restraint of inferior jurisdictions in their proper limits; the grave questions arising between the States and United States and between the United States and foreign nations, all demand of the Court a steady walk within constitutional and legal bounds, "without *fiction*, *collusion*, or mere *suggestion*." The temptations to transgress from without are manifold. In this case those from without are as follows:

In June, 1878, a bill was introduced into the Senate of New York, entitled, "An act to protect the rights of citizens of this State holding claims against other States," passed the legislature and was submitted to the Governor who disapproved it, and it did not become a law for reasons that are of record, and I have procured and submit to this Court.

On the 18th July, 1879, the act of New Hampshire, contained in the record. This act has the same title as the New York act of the year previously.

On the 15th May, 1880, the act of New York which the Governor vetoed in 1878, was reproduced in New York and became a law. The title is not changed.

In January, 1881, an act with the same title was introduced into the General Court of Massachusetts and referred to the Judiciary Committee of the Senate. The terse report of the committee that "the bill ought not to pass" was concurred in.

The record of the reasons of Governor Robinson for denying his signature to the act in 1878, is submitted to the Court.

STATE OF NEW YORK,
EXECUTIVE CHAMBER,
ALBANY, *June 14, 1878.*

Memorandum in brief of the reasons for disapproving Senate bill No. 292, entitled, "An act to protect the rights of citizens of this State holding claims against other States."

The Constitution of the United States does not permit a citizen to sue a State in the United States Courts. This bill

attempts to evade that provision by authorizing a citizen of this State holding any obligations of other States to assign his claims to the State and to be prosecuted in the name of the State by the Attorney General for the benefit of the individual. In other words, it requires the State to lay down its dignity, its honor and its integrity as a sovereign State of the Union, and to become a collecting agent for speculators in State bonds, or written obligations against other States, and in so doing to evade the constitution and to assume a false position by prosecuting claims in which it has no interest whatever.

(Signed.) L. ROBINSON.

The assignments of claim to the States of New Hampshire and New York of coupons or bonds of Louisiana, amount to a debt of $1,260 in the aggregate, and the assignments were from two persons in the case of New York for four-fifths of the sum: New Hampshire has not disclosed her trustful citizen. The States have not reserved to themselves any pecuniary interest or advantage from the assignments, and have not controlled the suits. The pleadings are prepared by counsel appointed by the assignors. Whatever fruit, whether sweet or bitter, these assignors are to be allowed to gather, the attorney general of each State is the trustee for the assignors and makes up his accounts only with them. Bentham describes a fiction of law as "A falsehood; and the purpose of the invention to be either that of doing in a roundabout way what might be done in a direct way, or that of doing in a roundabout way what the inventor had no right to do at all." This fiction of New Hampshire and of New York belongs to the second class. Were it sustained as only a circuitous mode of asserting a real right, then it will be competent for these States to enlarge its scope and operation, so as to concentrate in this Court the suits for claims of their respective citizens against all citizens of other States of the Union, and against all aliens who may be within the jurisdiction of the United States.

Acts of the Legislatures of those States procured by the same influence "to protect the rights of citizens of the State holding claims against citizens of other States or aliens" would be a title which would sufficiently disclose the patriotic object of the act under their constitutions. The briefs of the plaintiffs aver that no defendant can inquire as to the validity of any assignment. A half century ago some lawyers in Alabama invented a similar method of increasing their business in the Federal Courts of that State, by the use of a decision in this Court in respect to notes payable to bearer and their exception from the 11th section of the judiciary act. A large number of domestic notes so payable, were sued in the names of foreign holders, upon colorable assignments.

The Legislature of that State changed the signification of the word bearer in a note, and all notes so payable in Alabama at this day are transferable only by endorsement. The act contains a plain and an angry statement of the cause of the change in the law; it was the oppressive and abusive employment of the Federal Court for suits in which there was no jurisdiction, increasing costs and expenses and occasioning vexation. No considerate person can have any controversy with the legitimate operation of the judicial power of the United States, nor with the distribution made of that power among their Courts. There are cases where every portion of it may become necessary to the tranquillity and good government of the United States. But unquestionably neither the stability of the Union, nor the efficiency of the Courts, can be promoted by any tolerance of cunning contrivances of States or of individuals to introduce into them cases, which were not contemplated as suitable for the exercise of the judicial power of the United States.

Among the Romans there was a power among the judges to delegate the exercise of the judicial power.

Prior to the revolution in France, for a long period, offices of judicature were vendible and transmissible as property. The Supreme Court of the United States is ordained by the

people of the United States and the justices are not answerable for any ordinary cause, nor to any ordinary tribunal. Their tenure of office is coincident with the rectitude of their official life, and even their emolument for service is secure from petulant or angry legislation. Their power and responsibility is co-extensive with the Union. Their primary function is to maintain the Constitution and laws and treaties so that just administration may exist.

The Constitution separates the powers of the United States, from those of the States, and the Court is to maintain the distribution judicially. The States of New Hampshire and of New York, like others, have their rights assured in it.

Whatever controversy they have with any other State, may be adjusted. Whatever legal claim either has against a citizen of other States may be brought before this Court. But the Constitution has not appropriated this Court to the personal or private uses of any citizen of either State. But on the contrary this has been impartially withheld from every individual within the United States without an exception. But these States of New Hampshire and of New York through their legislatures have sent to their people a project whereby those citizens along smooth but winding ways, may attain advantages which the Constitution has not conferred upon the United States with their mighty powers, interests and responsibilities, and to no one of their citizens, native or naturalized. It is a cardinal principle in respect to the jurisdiction of Courts, that it cannot be conferred by the consent of the parties, even conjoined with that of the tribunal. The inquiry here presented is whether there be a controversy between the States, or whether there is a simulation of a controversy whereby a State may be called into this Court by an individual. The rational and enlightened view of these acts is represented in the message of Governor Robinson, in New York, and the report of the Committee of Judiciary in Massachusetts.

If these States cannot maintain the suit upon the assignment, made under the acts of their legislatures, New Hampshire is

destitute of any claim. She offers no cause of suit save that arising out of the contract of assignment. New York has set up another claim on the part of all her citizens who are creditors of Louisiana, which will claim some attention hereafter.

II.

Another question arising out of the statements in the bills of the two States has been brought to the notice of the Court through the answers of the defendants. These plaintiffs claim that they are owners, holders, and bearers of the evidence of debt of the State of Louisiana. The bills do not show agreements with the consent of Congress to obtain them; and the answer and evidence establish the manner in which they were obtained and that Congress did not legislate in respect to the subject. The inquiry arises whether States prohibited from making treaties, alliances, confederations, with any State, or agreements, or compacts, without the consent of Congress, in respect even to any subject of difference, can obtain by assignment, causes of difference or dispute, and maintain suits upon them in this Court. The cause of controversy exhibited are notes payable to bearer. The bills allege ownership and possession. It would not be contended that Pennsylvania could lease from New York, the Erie Canal; nor that New York could lease from Louisiana the levee within the city of New Orleans from the State, or agree with Maryland to lend the money to build the Chesapeake and Delaware Canal, nor to subscribe for an issue of bonds put forth by any one of the States, and maintain any suit upon any one of the contracts, we have supposed. Can one State without the consent of Congress, become the creditor or debtor of another State of the Union? If none of these things can be done directly, can one State purchase in the open market the issues of stock made by another State and become the holders of that stock on the same terms with individual purchasers or owners? Can the purchasing State of such stock

or negotiable securities and in the event of a default of payment, maintain a suit against the State in this Court, under the Constitution? The question is prolific of consequences and also of controversies if the answer be affirmative? This was foreseen in the season of war and trouble, when the confederation was formed. Compacts without the consent of Congress, were prohibited in the articles of confederation. In the various draughts of the Constitution before the Convention, the word compact was retained. In a plan of a Constitution drawn by Hamilton, *Contracts and Compacts* were prohibited. The word *agreement* is the word employed in the Constitution. What the prohibition includes was discussed in Holmes vs. Jennison, 14 P., 540.

The three Senior Justices, Story, McLean, Wayne, concurred in the opinion of the Chief Justice, and Justice Catron assented to the constitutional doctrine of the opinion. Without asserting that the case is a precedent, I may fairly refer to the discussion as weighty and impressive. The Chief Justice says: "In expounding the Constitution of the United States, every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added." The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition.

The Chief Justice, after a pertinent discussion which we omit, proceeds to say: "When therefore the second clause declares that no State shall enter into any agreement or compact with a foreign power without the assent of Congress, the words agreement and compact cannot be construed as synonymous with one another, and still less can either of them be held to mean the same thing with the word treaty in the preceding clause, in which the States are positively and unconditionally forbidden to enter and which the consent of Congress could not authorize."

This opinion defines what a treaty is, and what a compact is; and then it proceeds: "after reading these extracts we can be at no loss to comprehend the intention of the framers of the

Constitution in using all of these words: treaty, compact, agreement. The word 'agreement' does not necessarily import any direct or express stipulation. Nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both parties are acting, it is an agreement; and the use of all these terms, treaty, agreement, compact, show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention unless we give to the word agreement its most extended signification; and to apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."

The cases of New Hampshire and New York rest upon the same foundation. Those States have acquired by assignment from citizens of the respective States written evidences of debt which were put forth by Louisiana. After the maturity and the nonpayment of the debts, the invitations of those States have been accepted by creditors of the debtor State upon an agreement that they shall transfer their title for suit here. They claim to be exclusively the owners of the debt, and they appear by their law officer. Payment must be made by the debtor to the creditor; accord and satisfaction legal between other parties, can only take place by an agreement. Legal obligation on the one hand implies legal duty on the other, and these compel agreements, or may be compacts.

The plan of the Constitution was to secure union and tranquillity, by excluding occasions through which controversies might be engendered. Before the Constitution had been adopted and during the discussion upon it, the apprehension of controversies among the States, was the most conspicious condition of the public mind. A vigorous and efficient government to preserve the public order and to command obedience,

was desired to prevent estrangements and to quiet discussions. Ellsworth in the convention of Connecticut, alludes in strong terms to the necessity of union to preserve her from New York, and even Rhode Island; Maryland and Virginia, were in the same state of alienation. New Jersey was in despair from the superiority of her two neighbors, New York and Pennsylvania. The prohibitions in the Constitution illustrate the power of apprehensions. The sources of discord and contentions among States have been treaties, alliances, confederations, compacts, agreements, commercial competitions, standing armies, ships of war and war establishments. The first three and the last three were peremptorily forbidden. There were objections to the other even with a consent of Congress, so that there should be no sort of entanglements. Suppose that the word "agreement" be allowed the full meaning which has been assigned to it in the opinion cited, and that agreements of every description, written or verbal, or implied or expressed, between States without the consent of Congress be reprobated by the Constitution, it is difficult to understand how a State can have a direct relation as a creditor of another State by the measures adopted by New Hampshire and New York, for that purpose. The word agreement in the law language of Great Britain and the United States, corresponds with the word convention of the Roman laws.

It is the expression of assent of two or more to some juridical or legal relation. When A. sends into the market his note or bill payable to bearer, and B. purchases that note or bill he thereby has an agreement with A. It is besides a contract between them. The object of the prohibition apparently is that every State of the Union should understand, that there must be no relation by any mutual assent with foreign States; or with the States of the Union, without the consent of Congress; that the Constitution, treaties made under it, and the laws pursuant, were to be the only connecting links, the reason of all connections of affiliations between a State of the Union, and other States, foreign or confederate.

Anson on Cont., pp. 2, 3.

The bills filed by New Hampshire and New York, are harbingers of what may be expected from them, or from other States hereafter if they be successful. They ask the Court to set in judgment over Constitution and laws, and to annul them; they ask for a change of administration in the management of the Treasury, and that accounts be rendered in this Court for New York creditors, wherever they may be found to receive payments here. They say no assignment is required at all to New York, to authorize this suit. She has a sovereign right to appear in behalf of any one of her citizens.

Even in the matter of ceremonial, and upon questions of precedence and of etiquette, serious wars have been declared and friendly relations disturbed. Were there no prohibition of treaties, confederations, alliances, agreements, compacts, every State would have her ministers and every capital of a State would have its republican Court, with its intrigues and plots. The extent of the wisdom of these prohibitions is evinced in considering the aspects of the cases before the Court. Is there no menace to the tranquillity of the Union by an array of States here? They may be powerful, aggressive, and claiming to be empire States, deriving control of obligations of other States which are embarrassed or impoverished, perhaps, to invest surplus capital, or to make a sinking fund, as the Attorney General suggested yesterday, or perhaps to dominate the State into alliance or confederation, being her creditor.

Suppose some calamity to befall the debtor State, like war, pestilence, inundations, social revolutions, anarchy, misgovernment, to produce financial disorder. The creditor comes as an empire—with influence, power, clamorous demand, insulting reproach. The provisions of the Constitution have preordained the remedy for the mischief to follow such a condition. The Courts are not open to hear the clamorous demand, nor the insulting reproach. No armies, nor ships of war, nor domestic nor foreign alliances, nor invasions, are allowable to the imperial State to disturb the public peace or to reduce to ruin a rival or inimical community.

We are told with authority that the borrower is the servant of the lender; that the nation which lends and does not borrow is blessed, and the nation that borrows and does not lend is under a curse. There is uncertainty, disorder, perplexity, and cause for apprehension and anxiety in the condition of a State where there is an exorbitant debt. These are all aggravated when the public debt is principally in the hands of foreigners; and this is augmented when the creditor is powerful and aggressive, and the quarrel to ensue internecine. The Constitution does not prohibit the creation of debts, but even as to these there are provisions which indirectly restrain. But it has declared in terms which cannot be misunderstood that between the States there shall be agreements of no kind without the consent of Congress, and to individuals that the Courts of the United States are closed to all individuals who would enforce contracts against States.

III.

The answers of the defendants deny the jurisdiction of the Court of Chancery to entertain suits upon a purely money demand, such as is set out in the bills of the plaintiffs, and nothing is shown to avoid this objection to the bills of the plaintiffs.

Revised Statutes of U. S., 723.

IV.

There are two other cases submitted to this Court which have an object analogous to the cases of New Hampshire and of New York. They come to this Court from decrees or judgments pronounced in the Circuit Court of the United States in New Orleans. The case of the State of Louisiana, on the relation of Elliott, Gwynn & Walker, was commenced in a State District Court to obtain a mandamus against the auditor and treasurer of the State, (Jumel & Burke,) to direct the payment of coupon

warrants owned by these relators, out of moneys in the treasury of the State, raised by taxation under the enactments of the State Legislature in 1874, and which enactments were ratified by a constitutional amendment. No action upon the petition was taken in the State Court, but the case was removed to the Circuit Court under the acts of Congress providing for the removal of suits between citizens of different States. After the removal the defendants appeared and answered, and the facts being ascertained the Court dismissed the petition for a mandamus. A case of the same character and facts as this was commenced by another party in the same District Court of that State, and was decided in that Court, and the judgment therein was carried by appeal to the Supreme Court of the State of Louisiana, and is reported as Hart vs. Burke, Treasurer, 33 Ann, pp. 500. This case was argued in the Supreme Court of Louisiana, and decided, and was again examined on a petition for a rehearing.

The decision was by an undivided Court. The decision of the Court was: "No constitution nor law of this State has ever clothed the District Court or the Supreme Court with authority to support a suit against the State, and to award judgment for the payment of the same, or to force her to make indemnity for breach of her obligations without her consent, formally expressed, which is found to be wholly wanting in the present case, in which her adverse will manifestly appears." The Circuit Court of the United States cannot acquire a jurisdiction to issue a writ of mandamus in a case like this by any thing which is contained in the Codes of the State of Louisiana, regulating procedure in the Courts of that State. There is an absolute abnegation of all authority on the part of the judiciary of the State to comply with the application of the relators in this suit, and a clear decision that the judicial power of the State does not extend so far. Nor can we admit that if the State had invested their Courts with such authority to decide questions of administration affecting the disposition of money in the treasury of the

State, and of which officers of the State were the custodians as her simple agents and mandataries, that they would in any manner enlarge the jurisdiction of the Courts of the United States, so that the Courts of the United States shall control and govern her official agents of administration in the performance of their official duty in the collection and distribution of the revenue of the State, in an important branch of expenditure purely of State concernment. These questions of administrative character in relation to the domestic affairs of the State are as exclusively under control of the State as similar questions in the government of the United States are under the control of the United States.

These exclusive questions are determined by the subject matter. Each government is organized with separate, distinct and co-ordinate departments. In Louisiana one department may not encroach upon the functions of another, and so in the United States.

This Court has on a number of occasions recused themselves from deciding causes and questions because the decision belonged to another department, and in other cases declined to interfere with adminstrative action as not within the scope of the judicial power. Other questions have arisen and decided upon no other ground than that the Congressional authority was conferred to dispose of such questions and that they could not be reduced to the compass of a case at law or in equity. The decision upon the Bank of United States, the constitutionality of legal tender laws and reconstruction laws are of this class. De Tocqueville in his work upon the reign of Louis XV, describes the Parlement of Paris, that had a normal and admitted jurisdiction to try cases but which had involved itself with determination of questions of a political character. He remarks: "here was a great anomaly, the consequences of which were not slow to make themselves felt. The pretensions it gave rise to became the source of a perpetual conflict between two powers, the judicial and political, the limits of which have never been clearly defined; and led in the course

of time to the destruction of the magistracy and royalty." Administration implies the habitual and vital action of government in the execution of the laws for the preservation of order. It is all of government apart from the enactment of laws, and the rendition of judgments in Courts. It has the care of public domain for preservation or distribution. The revenue of a State depends upon the Legislature. The representatives of the people order the collection or they refuse the collection of revenue. The popular branch alone can originate a revenue bill. Their responsibility is to the people. The power to raise, to collect, and to appropriate the revenue belongs to the Legislature.

The judiciary has no voice in the matter. The facts ascertained in the Circuit Court are, that certain moneys are within the Treasury which were collected as taxes; under the laws of the State these moneys could not be elsewhere. They belong to the State. The defendants, (Burke & Jumel,) say they are not charged with this money to pay the debt of the plaintiffs; the money is there for other purposes; that no authority has been confided to them to examine the coupons the plaintiffs have for any purpose whatsoever; nor the bonds but for a single purpose. In the condition that the bonds are in, they say they do not represent a claim on anything in their keeping. All powers are terminated that were ever confided to do more than *one act*, and that has no relation to the coupons. They have, they say, no control contrary to the law of the Constitution of 1879.

The demand of the Syndicate is that, independently of the Constitution of the State, and of the laws and of the disclaimers, this Court must send an order to these two persons to audit the claims, and to draw the warrant on the Treasury of the State, for the payment of these coupons, whether the State Constitution, or laws, are willing or not. The debt has not been judicially ascertained. How can a debt be ascertained by a Court without the presence of the debtor? The primary evidence consists in a promise of the State, and the State does not recognize the evidence of the promise, and has declined to pay the demand. The

case is one that the Court has no capacity to deal with, unless the Court shall say that the powers of the Court are adequate to convict a State without any process of law, and for the precise reason that the Constitution, having prohibited a suit against a State, and that no process of law might be issued, therefore judgments may be rendered to enforce her contracts, or what are represented to be her contracts, without suit or process of law at all.

V.

The fourth of these cases is a chancery suit commenced by the same plaintiffs against the same officers of the State, upon the same matters of fact as are alleged in the case above mentioned. The findings of the Court are like those in the other case. The petition for a mandamus in the former case corresponds to the bill filed in this case. The prayer for a mandamus is the correspondent of the prayer for an injunction in the last. The former case came subsequently to the second. The former asks for payment, the latter was to keep the money in hand.

In neither one of these cases was the prayer granted. Nor was the State a party in either of them. The proposition in both is that, although the State cannot be sued *in personam* on her bonds and condemned by the judgment of the Court to pay, that she can be sued *in rem*. The money in her treasury is affected by legislative act, not by pledge nor hypothecation, but by the promise or contract of the State to raise money, and to use it for the payment of the coupons as they are presented, and that this contract to do this creates a right in the money itself, and that chancery can enforce this right, although the State cannot be sued in the Courts of the United States.

It cannot be pretended that any right of property has been conveyed by the various enactments. The enactments are all executory in their operation, and make no impression on the subject of the taxes. The persons to pay and the manner of payment, and time of payment into the treasury, are undefined.

The bonds remain in the hands of holders who may call for payment or may retain the bonds in their hands. When presented and paid, the holder does not inquire of the fund. The holders of these bonds would have acquired a right of action for the breach of a term of the contract, had the obligor been amenable to a suit. The action in every case of the kind must have been commenced against the debtor. A right of action is engendered by the contract itself, at its date, and this right inheres until it has been satisfied. This right of action becomes a vested, operative, efficient remedy upon the breach of the contract.

The embarrassments the Syndicate suffer in the prosecution of their suits arise from their stubborn resistance to the constitutional fact, that no right of action against a State, within the Courts of the United States, is acknowledged as engendered by or as inherent in any contract made by a State of the Union with any State, without consent of Congress or any individual whomsoever. Nor can such contract become actionable upon any term of it against the State, in those Courts.

A State of the Union has all the faculties of a civil corporation to acquire property and to form contracts. She has besides an immunity from suits in all the Courts of the United States, commenced by individuals. These are recognized in the Courts of the United States. When their judicial power comes in contact with the property of a State, in her own possession and subject to her dominion, or with contracts made by her, and where enforcement is sought for against her, that power is stayed. That judicial power, upon the ascertainment of the conditions, recedes without further inquiry or action, in obedience to the Constitution, which has marked and defined bounds it must not pass.

VI.

The relation of the State of Louisiana to the subject of this controversy, and to the judicial proceedings against the State and her officers, we have undertaken to define in Article III of our brief:

III.

The conventions or agreements of one of the States of the Union with individuals create no juridical relation between the parties; nor create a juridical obligation. The immunity of the State from suit or claim in the Courts of the United States, in her own Courts, or elsewhere, leaves her conventions or agreements without other than moral sanctions. They belong to the class of conventions or pacts "*quæ non habent causam civilem*," and are distinguished from contracts which create legal rights that may be enforced by suit in tribunals established by the State. In the Federalist it is said "There was no color to pretend that the States had renounced this immunity from suit, nor be divested of the power to pay their debts, in their own way, free from any constraints but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign and have no pretensions to a compulsive force. They convey no right of action independent of the sovereign will.

Federalist No. 81, p. 382, Ed. 1818.

The author of this number, (Hamilton,) in his report upon the public credit, discriminates this characteristic of public debts. "Public debt," he says, "can scarcely be defined either property in possession or in action. It is evidently not the former till it is reduced to possession by payment. To be the second would suppose a legal power to compel payment by suit. Does such power exist? The true definition of public debt is a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

Hamilton's Rep. Annals of Cong., 1795, pp. 13, 62.

Mr. Webster in a professional opinion given to Barings & Co. in 1839, relative to State obligations, develops the same senti-

timent, and declares this immunity of the States from any compulsory force. He says, "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments; the same basis for example as loans made by the United States under the authority of Congress; that is to say the good faith of the government making the loan and its ability to fulfil the engagement * * *". He says, "It has been said that the States cannot be sued on these bonds. But neither could the United States be sued, nor I suppose the crown of England in a a like case. Nor would the power of suing give to creditors, probably, any substantial additional security. The solemn obligation of a government arising on its own acknowledgment would not be enhanced by a judgment rendered on such bond."

VI Webster's Works, 537; I Calhoun's Works, 260–263.

Justice Blackburn incidentally says, "That foreign and colonial governments frequently create a public debt, the title to portions of which is made to depend on the possession of bonds expressed to be transferable to the bearer or holder; there can hardly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government."

Crouch vs. Cred. Fon., L. R., 8 Q. B., 384.

The French jurists recognize the difference between such securities and the ordinary commercial and mercantile obligations and credits which circulate on the Bourse. They say, "In effect that which gives to an obligation its character as an act of commerce is not its transferable quality by endorsement, or manual delivery, or the usage in regard to it in the course of trade. It is the nature, the cause, the origin of the act itself. It is impossible to maintain that the State performs an act of commerce, so that she is a merchant. The State does not borrow in order to trade, or to buy and sell again. Her act is of political or administrative import. The fact that the securi-

ties are sold in the market, or are quoted in the reports of the exchange does not alter the nature of the obligation nor the quality nor character of the debtor. These are independent of the obligation."

42 Dalloz, Jurisp. Gen. Tresor public, No. 1105.

A similar opinion is expressed by this Court in a suit relative to a bill of exchange drawn by the United States upon a foreign government. Such a draft was not a subject for the law merchant. Every security put forth by a State is dependent upon the action of the legislature for payment. A law is necessary for the withdrawal of the public money from the public treasury. Every bill of exchange drawn by it must be drawn on a fund and no officer can bind the State unless by the sanction of a law. No suit can be brought to enforce the making of an appropriation, nor to compel the payment of the money.

Bank of U. S. vs. United States, 5 How., 382.

2 H., appendix, 745, 760; Reeside vs. Knox, 2 Whart., 233.

The clause in the Constitution of the United States which prohibits a State from passing a law to impair the obligation of contracts can have no application to the securities thus issued or circulated. These securities have no juridical quality. They cannot be enforced by judicial means. They create for the holder no legal right which may be asserted in a legal tribunal.

It may be admitted that the duty to make payment according to the tenor of the bond is a moral duty and binding upon the conscience of the State. What we affirm, is that the Constitution of the United States contains no provision to constrain the performance of the duty by any legal or political sanction.

This Court may, when a case is presented, refuse to acknowledge the validity of a law of a State which impairs the obligation of a contract. But there is no power to enforce against a State obligations for the payment of money which the State has executed.

The clause in the Constitution which prohibits a State to pass a law impairing the obligation of contracts, was introduced at a very late stage of the proceedings of the Convention. Mr. King, of Massachusetts, proposed to incorporate a clause that had been adopted 13th July, 1787, by Congress as a part of the ordinance for the government of the North-west territory. The clause is: In the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force that shall in any manner whatever interfere with or affect private contracts or engagements, *bona fide*, without fraud previously made. The principle of this clause is, to protect contracts from retroactive and injurious legislation. It recognizes contracts as vesting rights of property that ought to be protected from interfering legislation. The idea was adopted in the Session of the Convention of the 28th August, and came back from the Committee of Style, who arranged the Constitution, and made a report the 11th September, nearly in the form in which it exists in the Constitution.

The purpose of the clause is indisputable. Its import remains to be considered.

The word contract has acquired prominence in the law language of Great Britain and of this country, as a generic term within this century. The word is not found in our English Bible, though in that Book relations analogous to contracts are much spoken of. The word covenant, in its connection with and corresponding to the Latin *conventio* is the favorite, though agreement and promise are occasionally found. Lord Coke, speaking of a demise of land, says, there is an implied contract of the lessor that he is seized for in every contract, there must be a *quid pro quo* for *contractus est quasi actus contra actum*, and if the lessor hath nothing in the land, the lessee hath not *quid pro quo*. In the *Termes de ley, verbo*, contract, the word is defined as a bargain or a covenant between persons, where one thing is given for another, which is called a *quid pro quo*. If I sell my horse for money it is a good contract, but if a man make a

promise to me, that I shall have, and he will become a debtor therefor, I shall never have a case to recover him, because the promise was no contract. Chitty, in his work on contracts, has a definition, but he says the word is applied usually to unsealed agreements. The classification of debts, some time after Blackstone, was of debts of record, specialties, and simple or parol contracts.

Chitty on Cont., 1, 2. Co. Litt., 47, b.
Becket vs. Bradley, 7 M. & G., 998.
Wiseman's Case, Co. II, p. 15.
Reniger vs. Fowgoss, 1 Plowd., p. 17.

One would hardly suppose that the public securities of a State in 1787 were classed as contracts. The first sentence in a recent work on the principles of contracts is, "It is somewhat curious that no such thing as a satisfactory definition of contract is to be found in any of our books." Pollock, Prin., p. 1. There was hardly a publication upon the subject before Powell in 1790. Pollock and Anson concur that a contract is an agreement by two or more persons, in a common intention in relation to some matter of a juridical nature. They concur that agreement is more comprehensive than contracts, and that the difference is that a contract is an agreement enforcible at law between two or more persons, by which rights are acquired or duties imposed. A contract is an agreement that raises an obligation, and a careful examination will show that it was employed in this sense by Lord Coke, in the other work I have cited.

Anson on Cont., sec. 9.
Pollock on Cont., p. 6.

"In the largest signification which can be given to it correctly," says Austin, "it denotes a convention or agreement which the Courts will enforce, that is, it bears the meaning originally attached to it by the Roman jurisconsults. In the Roman law, convention is a synonyme with the word agreement, and it comprises contract and something more.

Austin on Jurisp., 1016, 1017.

The Constitution ordains, that no State shall pass a law impairing the obligation of contracts. Contracts, the subject of protection are those agreements which would have been enforceable at law, in case there had been no impairing law to intervene as a hindrance. The Constitution does not enjoin a State to furnish ways or means by which contracts shall be enforced, nor that they shall be effectively enforced. These are left to the State to provide at her discretion and opinion of duty. The Constitution does not undertake to organize the State government, nor to distribute her judicial power, nor secure a competent administration of that power in the State. The Constitution provides, in respect of bankruptcies, a control over contracts and for their enforcement, but, only incidentally and between certain parties, does it go beyond this? The Constitution was framed to form a union among States which had been organized, where contracts already existed and laws for enforcement had been carefully enacted. The apprehension existed that from the fluctuations of trade, and the spirit of speculation or from extravagance or internal disorder, a time might come when the sober expectations of industry and the obligations of contracts would be disregarded, and that there would be interfering legislation with existing contracts, whereby the rights of one class would be diminished for the convenience or profit of another.

The contract to be protected is an agreement upon the subject of some legal relation, and it imposes a legal obligation enforceable in a Court of justice. Such a conventional obligation cannot be impaired by any law subsequently made. Under the Constitution such contracts confer rights, which are property, and of which a party cannot be deprived by arbitrary legislation.

The effect of contracts is to create obligations, and obligation and right are inseparable and correlative ideas, and are found in all contractual obligations. The rights and obligation are legal, and do not refer to any that are not already under the

safeguard of law. Agreements which have their origin or sanction in principles or motives of morality, equity, propriety, charity, comity or amenity, are not included within the compass of this Constitution.

The duties that men owe to themselves, or to their families, or to their neighbors, or to humanity at large, give rise to obligations, but unless there be a valid legal contract, under all the conditions prescribed by the law for such a relation, it does not enforce them, nor does the Constitution protect them. These are imperfect obligations, the characteristic feature of which is that they do not confer a right of action.

The Constitution was made through the agency of the States which compose the Union. These States had laws and a magistracy, and fully understood that the binding and efficient force of a contract was to be found in their laws and their magistracy.

The authors of the Constitution understood that a contract obtained its obligatory strength from the public authority which was pledged to afford justice without denial or delay, and that an impairing law could only operate to diminish or to restrain the employment of that strength. Hence the Constitution makes no address to the parties to a contract, and reads no moral lesson such as found in the ordinance of 1787. The Constitution finding in the section of that ordinance which had been brought to their attention an existing evil, and the remedy, embodied it in the expressive clause we have quoted. The evil was legislative interference with the engagements of men whereby rights were impaired. The prohibition is that no law shall be passed whereby this shall be done in the future. The object was to maintain in favor of the parties to the contract the relations of the State in the same condition as when the contract was made.

There must be no interfering legislation. The obligation of the contract must not be impaired. The Civil Code of Louisiana has borrowed from the continental codes of Europe an article

at once accurate and forcible. Agreements legally entered into have the effect of laws on those who have formed them. C. C., 1901. This is the import of the Constitution of the United States. Parties who are capable, and freely consenting and acting according to the laws, in view of the civil and social necessity for intercourse, traffic, commerce and interchanges of property, may make contracts, and these shall have the effect of laws between those parties without interference or diminution on the part of a State. The denial of the aid of the State by a subsequent law or alteration in the time or manner of performance, or in the withdrawal of existing remedies, conflicts with this Constitution. We have cited cases in the briefs and the works of commentators to determine the meaning of the word obligation. Two meritorious works by English authors may be quoted. Anson defines the obligation of a contract to be a right which arises out of every contract validly made. There is a corresponding duty to respect that right and to perform the duty. Upon a failure to perform, a *vinculum juris* arises and binds the parties, which is only loosened by payment. Pollock says where there is a perfect obligation there is a right coupled with a remedy, that is, appropriate process by which the authority of a competent Court can be set in motion to enforce the right.

Anson on Cont., p. 7; Pollock prin. Conts., 568.

This Court for the last decade has been instructing large communities in the United States, practically, the signification of a *vinculum juris*. The Court will appreciate the description of a Belgian civilian of great learning and of much repute.

He says: an obligation is a lien; the Latin expression is more energetic—a chain. He who is enchained cannot escape the power of him who holds him in fetters. He to whom he is obliged can carry him before the tribunals and compel him to surrender whatever he withholds. He cannot be delivered from this chain until he has performed his contract. I hasten to say

this is all figurative—It is the lien of the law which binds the debtor. But this lien may be likened to corporal fetters, for whoever constrains his debtor, diminishes the debtor's liberty. So long as he is obliged he is not free; he abdicates his liberty.

15 Laurent, No. 424, p. 477.

Pursuing the same inquiry, we find obligations are divided into classes—civil and natural. A civil obligation is the only one which codes deal with. The civil obligation is that one which gives to the creditor a right to pursue his debtor before the tribunals, to compel him to fulfil his engagements by process of execution against his property, or his person in some cases. The natural or imperfect obligation does not create a lien of law, but only an equitable claim. It does not confer upon the creditor a mode to coerce the debtor to liberate himself.

This class of obligations are those which appeal to the reason and the conscience, and have no sanction in the form of an action, and so they are not referred to in the Code.

1 Picot, Code Civ., pp. 662–3.

Larombiere does not differ from the authors cited, as to the nature of the contract nor the quality of the obligation: "A contract divested of the faculty of maintaining an action, is without a legal existence. It is as if it were inexistant. So long as the right of action exists, the debtor cannot with impunity withdraw himself from the fulfilment of his obligation. The action is exactly framed to overcome resistance, and to compel him to fulfil his engagement through the modes of execution which are the consummation and end."

Larombiere des obligations, pp. 360–364, Secs. 1, 2, 3–6, 7.

The decisions of the Court upon the application of this clause in the Constitution to the charters of private corporations, indiscriminately, have had the effect to add an additional clause in

the various State Constitutions to the end that such laws are made revocable as other laws, and do not imply a contract of a perpetual obligation.

In Sturges vs. Crowninshield, 4 Wh., 208, Chief Justice Marshall defined the obligation of a contract to be the law that binds the debtor to perform his undertaking, and that any law that releases him from this obligation impairs it.

In Dartmouth College vs. Woodward, 4 Wh., 518, the Chief Justice stated the arguments and the history of the constitutional clause, and the motives being an interference with the contracts of individuals, and inquires as to the signification of this clause.

He answers: "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and that the Constitution is not to be so construed may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a Court of Justice." This statement leaves us at liberty to consider whether the contracts disclosed in the various suits before the Court upon this argument, be such as can properly be maintained in a Court of Justice. Before dealing with that inquiry, I will examine the case of Ogden vs. Saunders, 12 Wh., 332.

The important question decided by the Court was, the validity of certain laws of New York which discharged a debtor, whose debt was contracted in New York where he resided, and whose debt originated after the laws had been adopted by the State. Chief Justice Marshall denies the power of that State to pass any law, the effect of which was to discharge a debtor for insolvency or other cause, and that whether the debt was contracted before or after the enactment of the law, was immaterial. The Constitution had employed terms of prohibition, which comprehended contracts and obligations of contracts without an exception, and no exception could be made.

The Chief Justice was not sustained in this conclusion by the Court. His opinion is cited to ascertain the comprehension of the clause. He defines the contract as an agreement which binds to the extent of the stipulation. The case before him was to enforce an acceptance of a bill of exchange. "All admit that the Constitution refers to and preserves the legal obligation of the contract. Obligations purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed upon States by the Constitution are intended for those objects which would, if not restrained, be the subject of legislation." Justice Washington delivered an opinion in this case upon the same question: "I ask," he says, "what is it which constitutes the obligation of a contract? The answer is given by the Chief Justice in the case of Sturges vs. Crowninshield, to which I readily assent now as then: It is the law which binds the parties to perform the contract. It cannot for a moment be conceded that the mere moral law is intended, since the obligation which that law imposes is altogether of the imperfect kind, which the parties to it are free to obey or not, as they please."

We are thus brought a second time in face of an important inquiry, as to what is meant by imperfect obligations? Larombiere, who has been cited in the brief filed, furnishes a description. He says, "the duties of man in society are distinguished into two kinds, having a reference to the positive sanctions derived from civil laws. Some of these are duties of justice, others, duties of morality. The first are those to which the law accords a sanction, and the fulfilment of which can be compelled by means of constraint, and action under the guarantee of society. They constitute obligations properly so called, and they import a juridical lien. They engender a real right in favor of the person for whom they have been created. Duties of morality have no positive sanction. They exist without conferring an essential right. Hence, as the civil law only recognizes obligations,

the moral law merely recognizes, and can only recognize duties. If the positive law has the same point of departure as the ethical or philosophic law, it does not have the same extension, and as it has been said that the law has the same centre as morality, but has not the same circumference."

3 Larombiere des ob., pp. 58–59.

1 Bentham's Works, p. 148, sec. 8.

Larombiere says: That when an obligation is produced with the imposing characteristic of a legal necessity for its fulfilment, we denominate it a perfect obligation in contradistinction to obligations denominated imperfect, because their execution cannot be coerced by a lien of law, but only by a lien of morality honor, natural equity.

1 Larombiere, p. 5.

The imperfect obligations and their precise significance have attracted scarcely any attention from English or American authors. They embrace those arising from the incapacity of parties; contracts defective for want of compliance with legal formalities. Where contracts become inoperative because of some law, and there has been no performance or payment. Where there are no Courts competent to enforce them. Where the judicial power does not extend to their enforcement.

Pollock prin., 568–600. Cases cited in the briefs.

33 Dalloz, Jurisp. Gen., pp 65–66. Ibid, p. 246.

It has not been contended that any enlargement of the jurisdiction of the Courts of the United States has arisen out of the prohibition in the Constitution in respect to the States, so as to coerce them into an observance of contracts. Nor could anything in the Constitution diminish the force of the declaration in the eleventh amendment. The command of that amendment is absolute. Every holder of a security for the payment of money, whether issued by the Federal or the State Government,

cannot misunderstand his position. No judicial power exists to enforce the performance.

In the cases of New Hampshire and of New York, there is an objection to their suits, which arises out of the indisposition to enforce claims of parties which are not frankly and truly represented. The plea of the defendants is, that the enactments made by New Hampshire and New York, have invited the making of simulated transfers of right, without reality, and were designed to evade the spirit and the letter of the Constitution of the United States, and there is no controversy between the parties to these suits. Courts of Chancery discourage suits that are artificially produced, and do not arise out of the relations between the parties. The merchandise consisting merely of a faculty to come into a Court and to ventilate opinions and display passion is not allowed. The barrator, the huckster of litigious rights, the appointment of brokers charged with conducting suits for parties unknown to the Court meet with no hospitality. The objection we make appears at a remote period in history. Exodus, ch. 23, 1, 2, 3. A chapter of the Roman Pandects contains an edict and the constitutions of a line of Emperors under the expressive title: *De alienatione, judicii mutandi causa, facta.*

The pro-consul was directed to adopt every mode, so that one of the parties to a cause should not suffer by the act of the other. This might be done by a change of parties, and it is provided that the alienation, in bad faith of the subject of contestation, so as to make another party (*adversarium suo loco substituerit,*) should be the subject to a suit for damages, &c.

3 Poth. Pand., 412.

If actions have been transferred to persons more powerful than the owners, these shall be furnished by a loss of the demand. *Aperta enim credentium videtur esse voracitas, qui alius actionum suarum redimunt exactores.*

The Emperors, to protect debtors from an adversary too powerful, (*suscitandi potentioris adversarii causa,*) prohibits the assignment to the republic (*reipublicæ vel fisco*) in payment of his debt, the actions he may have against them.

It is unworthy of our dominion (*abhorret a sæculo nostro*) that the Fisc should receive an assignment to pursue the debtors of an individual, in payment of our demand against him.

It is *contra juris rationem* you should obtain the assistance of the State (*reipublicæ*) to uphold your claims against your debtors, under a pretext to pay your debts to the State (*reipublicæ.*) Another Constitution is an answer to one who proposed to give half of his effects to the Fisc, for the collection of the other. The answer was, that it was contrary to the principles of the Government to accept such donations, and admonished him. *Unde jus tuum, si quod tibi competit, citra invidiam fisci mei tueri solemniter cura.*

3 Pothier, Pandectes de Justinian, p. 422–426.

The tone and sentiment expressed by these citations are honorably reproduced and embodied in the message of his Excellency L. B. Robinson;—and the resolution of the General Court of the Commonwealth of Massachusetts, which we have submitted to the Court. The rule of chancery is to refuse recognition or aid to a party who comes to the Court as a volunteer. The Court has no friendliness to him who comes with declarations of irremediable injuries that he has sought to obtain that he might have the luxury of grief. Nor has it compassion for him who has ferreted after his trouble. When he has bought his grievance the Court is inquisitive and suspicious. But when he has nothing in the suit but his name and capacity to appear in suit, he is expelled with contumely. His pretensions will not be enforced.

Anson on Cont., 178.
Pollock on Cont., 299.
Story's Eq., Sec. 1040.
Poe vs. Davis, 29 Ala., 676.

The record shows that New Hampshire and New York have allowed the use of their names to the owners of the coupons to maintain these suits, for no other cause than that these cannot bring a suit here or elsewhere in the Courts of the United States. They assume, that the denial of judicial power to the United States was made upon some superficial and cursory view, or some irrational popular impulse that ought not to be respected at this day, and that States and citizens and the Court may without any self-condemnation connive at and participate in any piously plausible form of evasion. It is only necessary to preserve the pious appearances. This has been done by lending the name of the State and the service of an Attorney-General.

VII.

The Syndicate of brokers who have collected bonds for suit in their own names, found that a suit against the State could not be directly made, have attempted to reach their end by an expedient of another sort. The officers of the State charged to take the care of the public money have been brought into Court as casual and temporary bailees, and these are made to serve the office in the suit that Richard Roe was formerly employed to perform in suits of ejectment. In these suits of the Syndicate the State is charged as the debtor. The evidence relied on contains a promise made by the State. The sums of money which the bills would appropriate come into the treasury from the officers of the State who collect taxes, and the depository is the Treasury of the State, and the custodian, the Treasurer of the State. The State is not a party. The Constitution of the United States has taken care by a direct command to make it known that the judicial power of the United States does not extend to a suit against such a party. It is the only instance of such a command in reference to the judicial power. The State cannot be a party. Therefore, say the Syndicate, we

will appoint substitutes. The rule of chancery is, that the immediate parties to a contract or their successors are necessary parties to the suit for its enforcement. Other parties may be proper or allowable, and may, perhaps, become necessary sometimes, and under some circumstances, but the principals are necessary. In this case the State is the only party indebted or charged to be indebted. The object of the bill is to establish a debt against her and none other, to be paid out of money belonging to her and none other.

Shields vs. Barrow, 17 H., 130; 19 H., 113.
Pomeroy on Contracts, pp. 546, 484–5, 491.
Revised Statutes of United States, 737.

The Revised Statutes of the United States allow suits to proceed sometimes when all necessary parties cannot be made; but the absent parties are not concluded or bound.

The purpose avowed in this case, is to substitute the officers for the State, and to conclude the State as sufficiently represented. The suit is acknowledged to be a suit to bind the State *in personam*, and by the appropriation of money that the State possesses. The case of Osborn vs. Bank of United States, 9 Wh., 738, is cited, and I was startled to hear the Attorney-General of New York affirm to the Court, that this Court had sent a mandamus to the Treasury of Ohio and taken money from it. I never heard of this before—I may say every proposition stated in the opinion delivered in that case was carefully and calmly examined, and the decree rendered in the case embodies the exact conclusion attained by the Court and the limit of judicial action. The case as presented was, that the Bank of the United States maintained two branches of the bank in Ohio. These became obnoxious, and the Legislature imposed exorbitant taxes upon them to expel them from the State, and the auditor was empowered to appoint agents to make *seizures* of bank property, and to dispose of it if there was a default of payment. Before the taxes were payable, the bank procured

an injunction against the auditor and his agent, and served a copy of the order. Notwithstanding the seizure was made of specific sums of money consisting of specie and bills, and while these were in possession of the officers, a writ of injunction was served, commanding the officers not to dispose of the money, but to hold it subject to the order of the Court. Thus the Court had jurisdiction of the officers who seized and had possession of the money. This Court, to the objection by the defendants that they had no interest in the subject of the suit, and were merely agents performing duties as subordinates without claim of any kind of their own, and that Ohio was the only party to respond, made for answer; there was weight, and there was difficulty in the objections, and that the difficult question to be decided was, whether the Court *may act upon the agents employed by the State and the money in their possession.*

The Court decides, after a careful inquiry, that the State of Ohio was not made a party to the suit, and that the eleventh amendment of the Constitution had not been transgressed by any action in the Circuit Court.

This question being settled, this Court states the true question in the cause. THE TRUE QUESTION IS NOT ONE OF JURISDICTION, BUT WHETHER, IN THE EXERCISE OF JURISDICTION, THE COURT OUGHT TO MAKE A DECREE AGAINST THESE DEFENDANTS? WHETHER THEY ARE TO BE CONSIDERED AS HAVING A REAL INTEREST OR AS BEING NOMINAL PARTIES?

The Court had decided before this suit that the Bank of the United States had a constitutional and a legal existence—that she enjoyed exemption from taxation, such as Ohio had imposed, and the laws of that State were thus inoperative. So the seizure was a trespass, and without any valid plea of justification. The title to specie and bills seized was not changed, and the bank might have resisted the seizure, and might have made a recaption without offence or might hold the seizors in trespass, trover or detinue.

But, the State of Ohio being powerful, and proposing to renew this every six months, and the sum being large and the danger of loss imminent, and the business of the bank endangered by such violence, a Court of Equity might, under such circumstances, arrest the moneys before they were put out of their possession in the hands of the wrongdoers, and so an injunction was allowable to restrain these agents from making any disposition or employment of the money in their hands, whereby restitution could be hindered. On the hearing these defendants were adjudged to have been trespassers. They were alike, and together or apart liable to restore the precise specie and bills they had taken. This property they had taken without lawful authority, and to return it in the same form in which it had been taken, so it should be restored to the owner, was a pure equity.

So scrupulous was this Court in the decree, that the decree of the Circuit Court was reversed, in so far as interest was allowed from the date of the seizure. The Court held that by the injunction the defendants were mere depositaries, and without power to employ, and thus interest could not be charged. Analagous cases to this are of frequent occurrence. A sheriff sometimes makes a seizure with process from a Court without jurisdiction, or when the judgment was rendered without citation. A collector of customs charges duties upon merchandise on the free list, or imposes and exacts an excessive duty. A Court appoints an administrator upon erroneous information as to the death of the supposed decedent. These officers are in every case personally liable at law, without reference to the persons interested in the orders, or who had procured them. A person interested as owner in each case, when there were facts of mischief and irreparable injury, might resort to Chancery.

The decree of the Court was a simple direction to the defendants to restore the money to the bank *they* had taken from it without right. They complied, probably, to the order upon notice. Certainly there was no mandamus sent to the

treasury of Ohio. Nor is there anything in this case to warrant the conclusion that this Court is indifferent to the conditions upon which it assumes jurisdiction. The second case referred to and insisted on by the plaintiffs is Davis vs. Gray, 16 Wall. The suit was by a receiver, in charge of the property included in a railroad mortgage upon which a suit for foreclosure and sale had been commenced by a trustee against the insolvent railroad company. An important property in the mortgage, and referred to in the order making a receiver, was a land grant to the company from Texas, of sections of land on the line of the route of the road for several hundreds of miles, through an unsettled and unsurveyed country. The railroad company was to finish the railroad, and on the completion of sections could have their grants located, and patents were to issue. The company was charged to make the surveys. Only a small portion of the railroad was completed. The surveys and locations were not complete. The railroad was not finished, as had been agreed. There had been civil war and trouble. The Legislature of Texas had legislated contradictorily, now releasing forfeiture, then declaring a forfeiture, and that the lands were for entry. Some entries had been made.

The receiver filed his bill to protect the grant from the location of warrants, settlements and incumbrances, under this legislation. He claimed to have undisputed possession of all the grant—that the title was a good one; that the allowance of other claims were ruinous.

The bill of the receiver is full and forcible, as if he expected no contradiction, and was determined to present a perfect case. It was not contradicted, though some of the statements are somewhat doubtful and certainly issuable. There was a demurrer; this was overruled. There was a decree *pro confesso*, a final decree and an appeal. The better report is in 1 Woods C. C.

Davis vs. Gray, 16 Wall.

The Commissioner of the land office in Texas has control of locations of warrants, settlement rights, and of surveys and the issue of patents. The Governor signs the patents with the Commissioner. The bill charged that there were floating warrants, and other rights that might or might not be located on the lands; there was risk and consequent damage. The holders were not known, and could not be ascertained. The number was legion. This receiver desired to keep his land grant free, and obtained an injunction that these officers should not act in the matter of the location of these floating, and inchoate rights on the lands covered by his grant. The State of Texas was not involved in this controversy. She had the full legal title over all the lands. The conditions on which the patents were to issue had not been fulfiled by anyone.

The Receiver had the property in possession under orders in a pending cause, and this was confessed by the demurrer and by decree *pro confesso*, and his title as alleged was not disputed. The Governor and Commissioner only claimed that they were the State, and the State could not be sued. The claim made was for a temporary suspension of the powers of officers connected with the land office of Texas, in favor of an acknowledged right of the railroad company, and of the receiver in possession. The opinion of the Court is diffuse, and discusses a variety of subjects in connection with the cause. The opinion in an analysis of the case of Osborn vs. Bank of United States, affirms that it had been decided therein, that it being impossible to make a State a party to a suit "*that the Court of Chancery may proceed to decree against the officers of a State as if a State were a party to the record.*" The decision in that case was, that whoever was concerned in seizing the money of the bank was a tortfeasor. That the injured party had his remedy against all or each one in a Court of law. In a Court of Chancery, that the Court having the specific tortfeasor who took, and who had the money, that none other party was needful to authorize the Court to proceed.

The case of Davis vs. Gray upon the facts agreed to by the parties defending, involves no question in which the rights or interests of the State were involved. The decisions of this Court afford instances of similar interferences with the officers of the land office of the United States by the issue of injunctions to withhold action, *pendente lite.*

The Board of Liquidation vs. McCombe is cited, as justifying the Court to dispose of property and rights of a State without citation or other process of law by a free application of this dictum in respect to the decision in the case of Osborn, to the effect that a Court of Chancery may proceed to decree against the officers of a State, as if the State were a party to the record in cases when the State could not be a party. As a general principle, it would be difficult to find one more inexact and more dangerous, if it be implied that any right or interest of the State could be concluded in her absence. The Statutes, creating the Board of Liquidation, are a part of this record. They provided that the board might prepare and issue bonds to pay specified debts, upon terms of composition. Two-thirds of the entire issue had been appropriated, when the Levee Company obtained from the Legislature the liquidation of a complicated and contested account of a different character, from the classes of debt mentioned in the laws, and to be paid in the bonds held by the board. A bondholder, who had made a settlement, objected and filed the bill to restrain the payment in this issue of bonds, and impeached the claim of the Levee Company upon the State as invalid, and that the legislative settlement was contrary to the Acts of 1874, and that the composition feature of the Acts had not been applied. This Court sustained the bill as contrary to the conditions of the Act, and that the board should not use the bonds for the payment of the Levee Company.

This Court treated the bonds as issuable only by the Board of Liquidation, for the specific purpose of carrying out the settle-

ment which had been proposed; and had proceeded successfully to the liquidation of a large proportion of the debts designated in the Act, and that those bondholders had an equitable right to insist they should not be otherwise applied under the contract contained in the Acts. This Court reversed the judgment of the Circuit Court, so far as it called in question the power of the State to settle the debt, in any manner she should devise, but that these bonds had been appropriated and were possessed, so as to be without the legislative control. The board had them in possession. In the case of Osborn, the decree of this Court did not affect any property of the State of Ohio. The Court had enjoined the seizing agent not to molest the bank before he had done so. The Court ordered him to hold the property seized, while he had it on his person. The Court, after demonstrating the illegality of the act of seizure, ordered the wrongdoer to make restitution to the injured owner of the specific article in hand. In the case of Gray, Receiver, the fact is admitted that the receiver held the property under the orders of the Court. The aim of the bill was to secure the title from deterioration, while under the control of the Court from interfering and incumbering rights which might be placed on the real property. The State of Texas was all the time the owner of the fee simple, and the contention was in respect to claims of an equitable character dependent upon the laws of the State. She had no interest in the controversy.

We are careful in the examination of these cases, for they are always cited whenever the title of a State to her sovereign claim is presented, as affording a satisfactory device, which had been contrived to relieve the Courts from any disability on the subject of a coveted jurisdiction. In a late publication by a New Hampshire jurist, the decision in the case of Osborn is described to be in effect "that the amendment did not prohibit the bringing of suits against the State, and was not so intended, but simply changed the form of the process and of the docket entry, and provided that the name of the State should be

struck out, and those of its officers, its other self, should be substituted for it."

Shirley, Dartmouth College Cases, 373.

In the cases before this Court, the State of Louisiana is charged in every case as the only debtor before the Court; or within the scope of any demand exhibited to the Court. The written evidence of debt which every case prefers for their observation is of the same class and import. New Hampshire, New York, and the Syndicate, make in their pleadings the same allegations, as the motive for their presence. In the cases of New Hampshire and New York, Louisiana is the party, and only party of importance. The Syndicate have followed the New Hampshire interpretation of the judgments of the Court in Osborn's Case, and adopted all of the changes in docket entries, and substitutions of parties and names that this recipe inculcates. The case of Chisholm vs. Georgia, is the leading case cited in the briefs as an authority.

The Constitution as published by authority is, "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." There is, however, an unpublished proviso to this article, to the effect, that, "*Courts of Equity may proceed to decree against the officers of a State as if the State were a party to the record, in cases wherein the State has a right or interest as if the State had been duly cited.* History tells us that there were forms of procedure which were for a long time concealed; and of esoteric doctrines, as distinguished from exoteric among philosophers.

In these cases the plaintiffs have informed the Court that the officers, who are defendants, did not make the bonds, nor have any title to any portion of the money in the Treasury of the State; that they are there under the strongest obligation, both moral and pecuniary, to refrain from using one centime of it

without the command of a superior authority, the Legislature of the State. In respect to these written evidences of debt, the coupons, they have no authority to perform a single act. The debt ordinance allows them to put a stamp on the bonds at the request of an owner, and till that be done, they have no official function to perform. The State, the owner of the money in the treasury, and which has commissioned these officers with these limited authorities must be deposed. The officers, by the decree of the Court, are to be substituted for the State, and they are to be commanded to perform the function which the Court shall find with the best lights they have in the absence of the only party in interest, the State should have directed, viz: That the officers shall examine the titles of the plaintiffs, to ascertain their validity, whether there has been any payment, release, accord and satisfaction, fraud or error, and if none, to certify the debt, draw the proper warrant, and obtain payment of the coupons offered in evidence.

The first question to be decided by the Court in the cases of the Syndicate is, that the State is a debtor as charged in the bill—that all the allegations are established by adequate proof, such as the law requires after notice to the person charged. The Constitution has made no provision for the substitution of parties to represent the State, nor for this inquisition into her affairs, in her absence; nor for a *curator ad hoc;* nor guardian *ad litem* to answer for her. Louisiana has no statute or rule whereby she can be made a party to a suit, and has none appointed to appear for her.

One is at a loss to find words more emphatic than those the Constitution employs to reprobate the demands of this Syndicate. The judicial power of the United States shall not be construed to extend. The judicial power of the United States is under the dominion of Congress in a large measure. Congress must never construe this power as extending to what follows—Congress must never pass a law to vest the power in any Court having jurisdiction at law or in equity, to do what is contained

in this amendment; nor must the Courts construe the judicial power to extend; nor shall the president construe the judicial power to extend to any suit at law or equity, commenced or prosecuted against a State by an individual.

The claim in the bill is, that the Constitution and laws of the State can be avoided, the keys of the treasury seized and the money applied, and that the laws may be steadily enforced that are set out in the bill year by year, in a suit in which the State is not a party.

We have endeavored to vindicate the decisions of the Court from the disparaging and dangerous criticisms that have been made, and from the bold and confident efforts to induce the Court to make interpretations that would justify the criticisms. We have the careful and labored judgment of the Supreme Court of Louisiana, that the judicial power of that State does not extend to the rendition of the judgment, such as the bill of the Syndicate demands.

The appropriation of the money of the State in the treasury belongs to the Legislature as representatives of the people. Here is no case of ministerial duty committed to officers, and where no discretion exists. The application has been made by the existing Government, and who are in possession of authority, and who have immediate control over the public property. In dealing with such a case, no subordinate in administration can be selected for suit, the State is the only party in responsibility or interest.

The answer made is, that the acts passed in 1874 are contracts, entail obligations, are protected by the Constitution, and may be enforced by the Courts, notwithstanding the impairing constitutional and legislative provisions. That the property in the treasury was raised to meet the obligations, and that the creditors have a title to a compulsory enforcement of the sums raised.

The bills show, the answers declare, the testimony proves, and the decree in the Circuit Court establishes, that whatever has

been done in relation to the execution of written evidence of debt, of the assessment, collection and distribution of the taxes, has been the action of the highest authority in the State, in the exercise of her supreme power under the Constitution reserved to her. The last and dominant expression of that power is, that the money in her treasury is disencumbered of any claim that the Syndicate has preferred. The subordinate members of the government affirm an entire inability to fulfil what they require to be done, and the Syndicate comes to the Courts of the United States for a reinforcement.

The inquiry comes back: Does the judicial power of the United States extend to the doing what is asked for in these two cases?

The judicial power of the United States is not plenary over the subject of contracts. Nor is that jurisdiction conferred for the enforcement of contracts or to maintain their obligation inviolate. The judicial power extends to a very large and important class of cases in law and equity arising out of the Constitution and the laws of the United States, and controversies between certain classes of individuals and States. The judicial power does not extend to any case of law or equity where a State is a defendant. The precise effect of a suit on a contract is to compel the debtor to pay what he owes, or to perform what he has agreed to do. Had these bonds or coupons been issued by New Orleans, for example, an action of debt on the coupons would have been commenced. A mandamus to compel the exercise of a franchise allowing taxation would have been competent. Had there been collected under a statute, a fund deposited with a distinct and separate agent, apart to pay interest, a remedy in equity to prevent a misapplication would have been allowable. In all of the cases there would not have been but one necessary defendant—the City of New Orleans. Nor would any Court for an instant listen to a motion without the presence of this defendant. For the reason that the supreme law of the land has

in plain and unequivocal language prohibited all the citizens of the Union, official or individual, from making suits, or finding authority for making suit against a State, these measures for circumventing and defeating that supreme law, and thus carry on a suit against the State, have been invented. The State is not sued directly, or *in personam.* The suit is to compel certain officers to do or forbear, whereby the debt of the State will be paid behind her back, with her own money, and contrary to her orders.

The acts of the Legislature in 1874, and the Constitution, are assurances or securities for the bonds. They contain agreements to use the powers of a State for the collection of money to pay interest and principal without defalcation. They are accessorial, subsidiary, executory agreements, whereby the treasury would be supplied regularly and sufficiently. The creditor would have the fruit when he presented his coupons at maturity.

Upon a default the creditor complains that his contract has not been fulfilled. The State is the debtor. The State has countermanded collection and appropriation. The State is the responsible party for the default.

The remedy of the creditor cannot be found in any Court. Suppose the State had granted a mortgage upon a township or a county of lands belonging to the public domain, and the State remained the owner of the land, and there was a default. No suit for a foreclosure or sale could be commenced in equity any more than a suit at law upon the bond in the Courts of the United States. Where no judgment nor decree can be pronounced upon the primary obligation because the obligation is imperfect, or the obligor not a subject of suit, no judgment nor decree could be rendered upon the accessorial, secondary and executory agreement. The primary stands alone, is not dependent. The accessorial is dependent, and is not enforceable without proof of the primary.

In these cases the plaintiffs have annexed to their bill a schedule of their debt against the State, and their demand is for

payment of the debt; the debtor being beyond any action of the Court by the Constitution of the Court. Nor is there anything marvelous in this legal Constitution of the Court. The obligations of States are imperfect obligations. They may be bought and sold, hypothecated, bequeathed, or donated, and the owner may accept payment of the money due. They are not enforceable by suit. Under the Act of Congress, passed in 1790: (1 Stat's at large, 138, ch. 34,) the United States pledged all of the receipts of duties from merchandise, tonnage, and from the sales of public lands, with some reservation for expenses of Government, for the payment of the public debt. The Act provided for preserving the money apart from other money, and for particular statement of the accounts of receipts on the books. The government in the first decade was embarrassed, and had a war occurred, might have been in default. Could a bond creditor have compelled a payment in such a contingency? What judicial process can coerce administrative action upon the pledges contained in the sections of the Revised Statutes, 3687, 3688, 3693, 3694, pp. 729, 735. These are as explicit as those of Louisiana. The cases we have cited show that the United States have habitually claimed immunity from suit, except in those cases where for convenience of administration they have delegated to her own Courts, the exercise of her own judicial power against herself. In the fundamental law of the United States, the people have prohibited the employment of their judicial power against any State of the Union by any citizen, and yet these cases are cases which no Court of the United States would entertain, were the United States the party concerned. It is sometimes represented that this amendment was a merciful concession to the States, to calm the timid and trembling apprehensions of indebted and impoverished States who were flying from their greedy and unrelenting creditors. I find a contradiction of this statement in the history. The law of this amendment is the recognized public law of the States of Europe.

1 Calvo, Droit Int., Secs. 536, 538, 540.
Dalloz, 1867, 2, p. 50.
Dalloz, 1879, 2–9.
Dalloz, 1849, 1–9.
See briefs, 32, 34.

We have cited two cases from the Court of Appeals in Great Britain. The first was a cause of collision, wherein an unarmed packet ship belonging to a foreign Sovereign, commanded by commissioned officers, and employed as a carrier of public mails, merchandise, and passengers for profit, was proceeded against *in rem.* The law officers of the British government appeared, and moved to dismiss the suit, as not allowed by the law of nations. The opinion of the Court is full on the general question. I quote a paragraph as pertinent to the cases from the Circuit Court as to parties. The Court say: If the remedy sought by an action *in rem.* is as we think it is, *an indirect mode of exercising the authority of the Court against the owner of the property*, then the attempt to exercise such an authority, is an attempt inconsistent with the independance and equality of the State which is represented by such owner. The property cannot upon the hypothesis be denied to be public property. The case is within the rule; it is within the spirit of the rule. Therefore we are of opinion, that the mere fact of the ship being used subordinately and partially for trading purposes, does not take away the general immunity.

Parlement Belge, L. R., 5 Prob. Divis., 199.

Another opinion, delivered in Twycross vs. Dreyfus, 5 Ch. D., 605, is pertinent to the same discussion in the suits of the Syndicate. The case was before the Court of Appeals to collect Peruvian bonds from agents of that government. Lord Justice James said: "It appears clear to me that the defendants are nothing but agents of the Peruvian government, and fill no other character whatever. They may have on the balance of account between them and the government proceeds of guano,

or other moneys available for the payment of the bonds, but that is between them and the Peruvian government. You cannot sue the Peruvian government. And it would be monstrous usurpation of jurisdiction in my opinion to endeavor to sue a foreign government *indirectly* by making the agents in this country defendants, and then saying you have got the money, and you ought to apply it, thus endeavoring to make the foreign government responsible to the Court." The pledge of security contained in the Peruvian bonds of these consignments of guano to the agents are as explicit, and the existence of money as derived from them in the possession of the agents was confessed by the demurrer to the bill. The resemblance of the cases is complete. The Justices agreed that the immunity from suit was as clearly violated by the indirect mode pursued of a bill against the agents, as it would have been by a suit against the government itself. The opinions we have quoted testify the scrupulous regard of these enlightened Justices to the rights of the absent, and to their own sense of the necessity in all points of honor to preserve the immaculate whiteness of their high office. They were not willing under the grave responsibilities resting upon them to exercise their judicial power under any conditions of indirection or of usurpation, or other devious methods. We have cited on the brief another case, where the ingenuity which was invoked to find a cause to sustain a jurisdiction did not receive encouragement.

Pryse vs. Pryse, L. R., 15 Eq., 31, 32.

The case of Chisholm vs. Georgia was a case of first impression in a Court newly organized, and composed of men who had not previously exercised the judicial office. The argument was limited to a single side. Justice Wilson commences his opinion with the statement that it was a case of uncommon magnitude. "One of the parties to it is a State certainly respectable, claiming to be *sovereign*. The question to be determined is, whether this State so respectable, and *soaring so high*, is amena-

ble to the jurisdiction of the Supreme Court of the UNITED STATES. This question, important in itself, will depend upon others more important still, and may, perhaps, be ultimately resolved into one no less radical than this. Do the people of the United States form a nation? He proceeds to argue that the people of the United States are sovereign, and "might have announced themselves *sovereign* people of the United States; but, serenely conscious of the fact, they avoided the *ostentatious declaration.*"

The question is stated with more simplicity, and was found to be more intelligible as it came from the counsels of the general Court to the Governor, Hancock, and was submitted to the Senate of the United States by their direction and by their Senator, and adopted by Congress—and was remitted to the Legislatures of the States and by their concurrence became a part of the Constitution.

We are able to find in this history the explanation of every word in this clause of the Constitution. It will be seen that there was submitted to the general Court of Massachusetts the subpœna served on the Governor, and the opinions delivered by the Justices of the Court in the case of Chisholm vs. Georgia. The subpœna commands the Governor and Attorney General to lay every other thing aside, and, notwithstanding any excuse to appear before the Supreme Court of the United States in Philadelphia to answer concerning the things which shall be then and there objected to the commonwealth of Massachusetts, and to do and receive on her behalf what the Court shall have considered in this behalf, under a penalty of $400. The General Court met, and on the 27th of September adopted resolutions which refer to the decision made in that case by the Supreme Court as a grievance, and which instructed her Senators and requested her representatives to take the most speedy and effectual measures to obtain such amendments to the Constitution of the United States as will remove any clause or article of the said Constitution, which *can* be construed to *imply* or

justify a decision that a State is compellable to answer in any suit by an individual or individuals, in any Court of the United States.

The fact that such a mandate had been addressed to the commonwealth was the precise cause of complaint. It may have been that the Governor and the Attorney General had read where Madison had said, in the Virginia Convention, "It is not in the power of individuals to call any State in Court," or what Marshall had declared, "It is not rational to suppose that the sovereign power shall be dragged before a Federal Court." Here was the mandate peremptory and menacing as if the State were an offender. It is not to be assumed that there is any concession that a foreign State is entitled to come into this Court at her pleasure, and to obtain the process of the Court. In whatever concerns the foreign relations of the United States, all agree the United States have plenary control, and that a State should be sued against her will has not been decided, and much may be said to the contrary. The solution by Madison and Marshall in the Virginia convention, is one to be carefully considered before any adverse opinion can be accepted. The amendment has been the law of the country since the Declaration of Independence.

No State has ever appeared to any suit commenced under the last clause of the second section and first paragraph of the third article of the Constitution. We have been considering here whether in three cases cited by our opponents, the rights of property of a State have been disposed of by the Courts of the United States with the sanction of this Court injuriously in their absence, and by a side wind such as prevailed in some Courts and communities to reach a result.

But on examination the imputation is proved to be unfounded, and that the authority confided to the Court has not been abused. Nor in the century that has elapsed since this immunity has existed, has there been any inconvenience to follow from its existence. The cases before the Court are tentative

efforts to change all the conditions of the judiciary organization, and to alter the Constitution, and the business of the Court, so that it may become involved and inundated with the debauching and corrupting litigations of those who make a merchandise of such things.

About the time of the decision in the case of Chisholm was discussed, an orator and a philosopher in another continent was propagating the opinions that the existence of nations was an obstacle to the emancipation of the human race. We are not free if any obstacle stops our march over any portion of the globe. An aggregation of persons that calls itself sovereign, affronts humanity. The rights of men extend to the totality of men. Nations are the scourges of mankind. It is necessary to remove all aggregations, termed Peoples, Nations, States, assemblies, kingdoms. A republic of the human race will have perpetual peace. There is no bridge of communication with the planets. The adventurous speculators of this country seem to be as impatient of constitutional or legal barriers to their schemes for hasty accumulation, as were those speculators abroad who are unreconciled to anything stable or permanent.

The bill of the State of New York has a distinctive claim in behalf of all of the citizens of the State who have or may acquire demands upon the State of Louisiana, and is a harbinger of the time when those remarkable engines that are spreading dismay in the oldest of all the nations of Europe, and wonder everywhere will bring us universal peace.

VIII.

Beside the claim made by New York upon the assignments of two of her citizens of their coupons, according to the invitation contained in her Act of May, 1880, the bill filed in her name, signed by her Attorney General, and prepared by the solicitors of the two coupon holders, introduces another claim of New York, for a decree of a wider scope. All of her citizens

who shall have become holders of Louisiana bonds, have become the subjects of the patronage of the Attorney General, or the Solicitors of the assignors, if not of the legislature, and a claim is preferred in the bill on their behalf. Three witnesses have been examined who say they have bonds, and have heard of others that had them, but none have been produced and filed in the record. The argument submitted in the brief of New York is, that having been a sovereign, and with powers to make war, issue letters of marque and reprisal, and otherwise to act in a belligerent way, she resigned these powers into the control of the United States, to be held in trust, and therefore this Court must make decrees in the cases in favor of the plaintiff, for judgment, making declaration of the default of Louisiana, and to subject her collecting agencies and accounting officers to the demands of the bill, and to compel the collection of taxes, to pay all the holders of coupons and bonds within the State of New York their interest and principal, from year to year, till the debt becomes due in A. D. 1914.

No precedent of such a suit has been cited, and we must admit the present has the merit of originality and invention. We have referred the Court to the debate and the report in the British House of Commons in 1875, in respect to foreign loans conducted by a member who is now Attorney General. Reference is made to the bellicose speech of Lord Palmerston, on a similar subject, in the year 1846, cited by the plaintiff. In this debate of 1875, the Chancellor of the Exchequer, (Northcote,) and the Foreign Secretary, (Earl Derby,) expressed decided and adverse opinions in respect to diplomatic interference in cases of personal losses by English capitalists, in cases of loans to foreign governments. During the same parliament the subject was again considered in respect to defaults committed by Turkey. The testimony of the leading bankers of Great Britain, and of the great financiers of Europe, is a dissent and contradiction to any policy or right to use governmental power in such cases. The

declaration of the Earl of Derby, the Foreign Secretary, and of the Chancellor of the Exchequer, and a paper communicated by one of the ministers, we append to our briefs.

222 Hansard's Deb.; 225 Hans. Deb., 202.

Another case cited in the brief of New York is that in which Lord Palmerston exacted indemnity from Greece for wrongs done to a British subject, Pacifico, as he alleged. Without making a statement of the facts, we shall content ourselves with reading to the Court from a late publication on international law of reputation. The author, referring to the case of Pacifico, cited, says: The conduct of the British Government upon this occasion aroused the indignation of all Europe. Russia, in a letter dated 19th February, 1850, addressed an earnest remonstrance through her ambassador. The Chancellor of the Empire (Nesselrode) concludes: "The reception which shall be made to our representations is destined to throw full light upon the relations which we henceforth shall have with Great Britain, and I will add, on her position as regards all foreign powers, great or small, whose coasts expose them to a sudden attack. It will disclose whether the British Government, abusing her immense maritime supremacy, has assumed a policy of isolation without reference to connections with other Courts, by disengaging herself from all common obligations, all solidarity of action, and so to authorize every great power, whenever she finds opportunity or occasion to recognize, towards every feeble power, no other rule than her will, and no other law than her material force."

The *Times* newspaper acknowledged "the dispatch to be irrefutable, its conclusions just, and its reproaches pungent." The House of Lords passed a vote of censure, by a majority of 36, on motion of the Earl of Derby, and Palmerston was put upon his defence in the House of Commons, and escaped by a very great effort.

2 Calvo, Droit. Intern., pp. 604, No. 1579.

Among the citations which are found in the brief of New York to illustrate her losses by her connection with the United States is, that she could not do as France, Great Britain, and Austria, had done in 1861 in respect to Mexico. These powers invited co-operation from the United States, and the United States answered if the purpose was to have a financial settlement that was not difficult, and the United States would co-operate. The response was, that besides this, they required to be assured, that for the future, by the establishment of a serious, efficacious and permanent protection of persons and property in Mexico. The United States did not co-operate, and France undertook the conquest of Mexico and the organization of an Empire.

The relevance of the case to the discussion is not distinctly understood.

The claim of New York stands on the proof of a debt for the sum of $1,060 in coupons, which the State obtained from two of her citizens, wherewith she could maintain a suit under her statute. Three witnesses have been examined to inform the Court that they too had bonds, and approved this proceeding, and that there are others in a like condition. None beside the two have accepted the Act of New York and made a transfer to the Attorney-General. Calvo remarks upon the demand on Mexico by these great powers: "If in principle it is difficult to admit that governments are justified to yield their recognition, their support, their direct intervention in behalf of subjects who freely lend their money to foreign governments, at the least, reason and equity require that when such interference with private contracts takes place, it should be commenced and conducted with a full understanding of the cause, and not with LEVITY.

1 Calvo, Droit Int., p. 296.

The suit of New Hampshire was commenced in this Court for the sum of $210. An injunction was moved for, and a

decree to declare law and constitution invalid, and money withdrawn for the State Treasury. New York improves upon the case. She has attracted two of her citizens to accept her overtures. Their debt combined is $1060. This debt was assigned, and a suit is thereupon commenced to collect this sum, and that a decree be made by the Court to direct and enforce the payment of interest and principal under the directions of this Court from the date of the decree till the summer of A. D., 1914. It is impossible not to contrast the conduct of the State of Massachusetts, and the conduct of Governor Robinson of New York, favorably, with such proceedings.

The third case cited in respect to reprisals, is a message of President Jackson in respect to France. It required the large capacity of Edward Livingston, then Minister of the United States in France, and the Senate under a leadership adverse; the interference of Great Britain, and the good sense of the people, to prevent serious complications with France for no offence whatsoever.

2 Writings of Gallatin, 494.

Reprisal is found in the Constitution of the United States. It represents now an obsolete idea among civilized nations. The thing is prevalent among the Comanches, Sioux, Blackfeet, and Cheyennes; and seems to have been thought of in New York, if Knickerbocker can be relied on as a historian. In the 10th and 11th centuries they were usual and prevalent. Those were centuries when robbery and pillage did not offend the general conscience. The law of force was predominant, and men rendered homage to the strong. But every right implies a reciprocity, and inferior force did not surrender its own claims. There were wars, contests, quarrels, combats, reprisals; violence begat violence; and ended at last in equilibrium. Organization, discipline, combinations, laws, caused the formation of States, and banished reprisals to the seas, and since then from recogni-

tion as a lawful mode of settling disputes or a proper mode of redress.

IV Muratori Antiq., pp. 49, 42.
5 Ducange, Glossarium verbo Repraesaliae.
1 Laurent, du droit Int., 260, 261.
W. E. Hall, Int. Law, 312.
3 Science du Publiciste, (Fritot,) pp. 252–5.

Calvo says: "that the law of nations which ruled the world to the end of the last century, and which reflected with some temperament the writings of Grotius and Bynkershoek, embodies principles which the civilization of the nineteenth century disapproves, and the modern international law disavows. It was a long time held that the person injured, whether in person or property, was authorized to obtain indemnity directly and immediately from the person who wronged him, and from any other person, public or private, of the same nation." It is conceded that New York surrendered her authority to maintain or support armies or navies, or to conduct war, more than a century ago, by articles of confederation, and that Congress has all the power that exists in the United States for such purposes; but there is no provision made for New York to substitute this Court as a place for venting the individual complaints of two or even more of her citizens. The Constitution has made every provision for the citizens of New York to appear in the Courts of the United States, deemed suitable by the authors of the Constitution, and the claim made by New York and her citizens has been disallowed, her own vote having been given in favor of the prohibition to do so.

In the year 1853, the United States and Great Britain concluded a convention for the adjustment of the claims of their citizens and subjects respectively, by means of a mixed commission, and that the decisions of the commission should be final. One of the claims presented arose upon an issue of bonds by the Florida Territory, and loaned to the Union Bank of the Territory to obtain capital. Another claim was upon an endorse-

ment of the Territory on an issue of bonds of a moneyed corporation. Both corporations became insolvent, and these bonds had not been paid. The United States were charged as having established the Territorial government, having a supervision of its laws, and a veto upon any act of the Legislature. The claimants urged that the United States had admitted Florida into the Union as a State, with an immunity from civil suits to their prejudice, and that the United States was a proprietor of lands in the State, and had stood in such a relation to the Territory, that in justice and equity they were bound for her debts. That a moral obligation is as high a claim as can be made against a sovereign power, and is as fully obligatory against such a power as a legal obligation. That a moral obligation is the only claim that can exist against a State. This argument was submitted to the UMPIRE, Mr. Bates, by Cairns as counsel, supported by Hannen. The umpire disregarded the territorial condition of Florida as of no importance, as there was no evidence that the United States was a party to the debt, and because that no such claim had been made upon the Metropolitan States for debts contracted by colonies. He said: "The bondholders have the same remedy against the State as they had against the Territory; they have a just claim. But they are under a well known disadvantage in both cases. They cannot sue a Territory; they cannot sue a State." He says: It has been urged that there is no way of getting at a State government, except through the government of the United States; this is a mistake. There is no difficulty in the way of individuals dealing with the separate States in any matters that concern the State alone. Nearly all the States have public works, and contract loans with individuals, American and foreign, and any person aggrieved may petition the Governor or Legislature for relief. A State cannot deal with a foreign government; the intercourse with foreign nations belongs to the general government. The umpire concludes: The bondholders have a just claim on the State of Florida, they have lent their money at a

fair rate of interest, and the State is bound by every principle of honor to pay interest and principal, and it is to be hoped that sooner or later the people of Florida will discover that honesty is the best policy; and that no State can be called respectable that does not honorably fulfil its engagements."

Report Commission for Settlement of Claims between United States and Great Britain, to Senate, 1856, p. 246.

We find here a lucid statement of the condition of the public law as well understood in Europe as in America, and as known in 1874, when these bonds were issued. The bonds for two or three years did not have a market value equal to their value now, and since the Constitution of 1879, and were there a remedy, such as is proposed here, the fact of depreciation would be unaccountable. Had there been an impression that the officers before the Court, were suable as a substitute for the State, and that the State was bound by such a judgment, the creditor would have had no misgiving. But the State as organized under the Declaration of Independence, and as she existed under the confederation, and as a member of the Union, cannot delegate to a board, or to officers, irrevocable powers of taxation, to be exercised by them under an independent, separate jurisdiction, having no responsibility to the State. A State can no more barter, sell, nor abdicate her position in the Union as a member, and her sovereign attributes as a State apart from her relations as a member of the Union, than she can make treaties, alliances, and refuse to take representation in Congress.

It is the opinion of this Court that the Union is perpetual, and the States are indestructible. That place determines their rights and duties, some of which are not subject to any transfer by any form of contract. It is so with persons. The law does not permit a citizen to change his status as a citizen, or member of society. He cannot alienate his right of suffrage, or as a husband or a father. He cannot pronounce his own insanity, nor decree

his own interdiction. He cannot sell his freedom, nor bind himself by contract with a creditor to go to prison, nor surrender himself to labor for him at his pleasure to pay a debt. The order and arrangement of American society under Constitutions, laws, usages, forbid these. So does the same order and arrangement require that the State shall remain undiminished, so as to rule all of these free citizens, whether separate and distinct as men, or as belonging to counties, towns, municipal or chartered corporations, or voluntary associations, or existing as families and groups, the State being the result of the exercise of dominion, power, faculties and energies of all, in whatever relation. The frame of the bill of New York is to place the State into the hands of a receiver for a third of a century.

Louisiana, through her conventions, Legislature, and people, after a review of the condititon of her population, and the calamities resulting from war, the loss of virile population, a convulsion in property, and social revolution, pestilence, floods and irresponsible and profligate government imposed on her, decided that the revenues of the State were not adequate to the expenditures needful. There is retrenchment in the Constitution adopted in 1879, and an anxious purpose to prevent misgovernment in the future. There was an abatement of interest on an issue of bonds under the Acts of 1874.

New York comes like a belligerent, bewailing her loss of capacity to make reprisals, and in lieu demands a receiver or some interdictory process whereby the State shall lose her powers of administration and government, and this Court is for a long period to perform functions not unlike those of a Brigadier in a State reduced to a department, to undergo reconstruction. The Courts of Louisiana properly decree that there is no power among them to perform the act required.

The Constitution of the United States does not allow of a treaty, alliance, confederation, agreement or compact, with any other nation or State, whereby any sort of control, constraint or influence shall arise to deteriorate or lessen the independence

and equality of any State as a member of the Union. All of the States of the Union, by their fundamental laws, place their treasury under the control of the representatives of the people. This was the right obtained by the war of independence. History tells of a King of England who borrowed money from one of his nobles, and assigned the Jews as a security, to be tallaged by the creditor, at his discretion, for the repayment of the loan. But this people were regarded as aliens, and not within the protection of the customs and laws. The basis on which English liberties was erected is, that no general tax shall be imposed without the consent of the nation, expressed in the common council of the realm; and the enforcement of honest dealing in the raising and expending of money, and the adjustment and limitation of taxation, and the securing of the people from the consequences of impoverishment, maladministration, financial overreaching of the government, royal or republican, have been the objects of all constitutional statesmen in every country. These have relied upon the representatives of the people. The King might assign an alien population to be taxed, but he cannot impose a tax on his subjects without the consent of the Parliament.

The enactments by the Legislature of Louisiana in 1874, and the constitutional ordinance of the same year, are declared to be obligatory as contracts. The bond is a convention or covenant to pay money at stated periods, and the laws acknowledge the binding effect, and undertake to supply the treasury with money by a specific levy of taxes annually, which shall be applied to the payment of the interest and principal as covenanted.

The enactments relative to the collection and appropriation of taxes, so that money be collected in the power of the State to pay the bond, has no higher obligation nor other sanction than the bond itself imposed. The engagement in the bond is to make payment of the bond according to the promise. The promise of the act is to provide the money for that payment by a specific tax. The obligation is fulfilled by the payment of the

money as promised. The question arises: Can this Court enforce the bond by a judicial process or proceeding?

The United States have no judicial power which comprehends a State, nor the property of the State, nor the contracts of a State, with any object of controlling her property, or enforcing performance of her contract. The fact that the United States may not do this, would seem to be an adequate answer. It is the State in the full exercise of sovereign power that has adopted the constitutional ordinance of 1879, and declared in what manner the public obligations of the State shall be performed. There is no authority in Louisiana that can overcome the force of this resolution, except the power that so resolved. The power of the State to contract debts, and the power of the State to adjust their debts according to their own sense of obligation and duty, is not withdrawn from her by her own Constitution, nor the Constitution of the United States. When the State made the debt, and made the arrangements to pay the debt, she was independent of control, and was not constrained by any legal or political sanction that Courts can employ. What Austin says on this subject is irrefragably true. The laws which sovereigns affect to impose on themselves, or the laws which sovereigns affect to impose upon their successors, are merely principles or maxims which they adopt as guides, or which they commend to their successors. The sovereign, for the time being, is not constrained to obedience.

Austin on Juris., p. 271.

My application of this citation to the States of the Union only embraces the power and authority of a sovereign character that are comprehended within the ninth, tenth and eleventh amendments to the Constitution, the Keystones of the Constitution of the United States.

It is not difficult to establish to the entire extent the proposition that States in all ages and of every degree, have employed this sovereign power over their receipts and expenditures, and

have exercised over their contracts and debts a control both identical and analogous to that which is embodied in the debt ordinance. We read that when Hannibal had failed in his attempt to conquer Rome, the Roman Senate debased her coin to one-sixth of its current value; and with that coin paid her debts to her legions, and that alterations of values took place in the time of the republic, and under the empire repeatedly. We know that the English pound sterling now is not one-third of its original value; and that it was depreciated in order to diminish the debts of the crown. Burleigh, in the time of Elizabeth, applied a correction.

We know that the French livre was debased more than doubly as much as that of England. Three times during the eighteenth century did that kingdom declare her bankruptcy, and adjusted her debts by a law. In 1793 the republic called in the evidence of her entire debt, and the Grand-livre of the public debt from thence should be the only title of any creditor. In 1798 two-thirds of the inscriptions were reimbursed by certificates to be used only in purchase of the public domain, which in a little time were without value, leaving only one-third of debt remaining. A portion of the debt had been contracted A. D. 1375, and had undergone in the five centuries the abrasions of bankruptcy, but leaving a portion of the debt still unpaid. Great Britain, in 1797, directed the suspension of specie payments, and the forced circulation of the bills of the Bank of England, lasting for 22 years. We know that the debts and engagements of the confederation were assumed by the United States under the Constitution, and that the domestic debt was settled by the reduction of a part of the principal; and continental money was redeemed with one for one hundred, other issues one for forty. That the payment of interest was deferred upon other portions of the debt till the year 1800, and generally reduced so that the treasury should not be overburdened, and that public credit might be restored. By every State of Europe, except Great Britain, under the pressure of war, internal commotion, public calamity and improvidence,

within a century, similar expedients have been resorted to. Philip IV, of France, is described in history as covetous, unscrupulous, cruel. He debased the coin and issued it at the nominal value, and would redeem it or receive it in payment of taxes only, at its intrinsic value. Dante describes him as a malignant plant, a modern Pilate; and when the poet has in the Paradise a vision of those books wherein the misdeeds of men are written down for the Judgment, he is reminded of the evil the man on the Seine had done in falsifying the coin—*falseggiando la moneta.* A modern Publicist, in recounting the changes in the standards of coinage in different countries, and the adulterate currency circulated from time to time, under stress of necessity, or more frequently because of profligate and unwarranted expenditure arising out of a vicious policy, and citing the debasement of the money in France, Great Britain, the United States, Russia, China, and nations of Europe, leading to commercial embarrassments and individual ruin, says that these great Empires and States had followed in the footsteps of that King, whom Dante had branded as a counterfeiter—*un faux monnayeur.*

The cases before this Court do not require nor allow of explanations nor apologies for Louisiana. The State has said to her assailants, whether States of the Union or citizens of States of the Union: "Who art thou that judgest another man's servant? To his own master he standeth or falleth."

The colonial history of this country is not wanting in instances of embarrassments, miscalculations, extravagance, and an undue appreciation of paper money, and an inadequate sense of the mischief of debt. Nor is the history of the United States during the century of their independence destitute of those instructive and costly lessons which our wise Franklin has told us that come from that stern master—Experience. Their well-being has compelled, or was supposed to compel, excessive issues of paper money, the suspension of cash payments by banks, the forced circulation of bills of credit, and the funding of debt upon

terms of composition. The American creditor has complained out of Court, and in Court, that the obligation of his contract had been impaired and his vested rights had been infringed. The empire State, too, has extended forbearance and clemency to imperial institutions by suspending the effect of her laws. In these cases the policy was, perhaps, judicious, the mischiefs exaggerated, and a benefit attained—perhaps not. But the facts show that there has arisen, and will continue to arise, conditions where the law-making power must deal with such conditions upon principles that frequently inflict damage on individuals, and apparently violate sound principles of law and economy. The solution of such questions cannot be made in the decision of a CASE at law or equity. The laws are evoked because of the complication in public affairs. They are relative to government and the conduct of administration, and are needful to the attainment of ends by the employment of such means as the State has. In the guidance and administration of a State, there is nothing to be set down as immutable or irrevocable. The legislation, whatever it may be, ought not, except in few and unfrequent cases, to assume for any one the definitive character of property. It is also in respect to a State of this Union. A State, like the United States, must retain powers adequate to the exigencies that may arise in its own condition. That condition is mutable, and the exigencies to arise are not manifest, sometimes not discoverable. It must therefore be always free to provide for permanent and steady security in the administration of the affairs of the State. It is not competent for her to disable herself by any alienation of her powers for this purpose, nor be controlled in their exercise. Nor can any presumption be entertained that she has done so. In the case of Chisholm vs. Georgia, the Court seemed to suppose that the most extensive interpretation was proper to subject the State to suits as corporations, and because the Court was armed with supreme and unrestricted judiciary powers. Neither of the assumptions were

justified. One of the amendments submitted by New York, avowedly as explanatory, was: "That the Constitution under consideration is not to be construed to authorize any suit to be brought against any State in any manner whatsoever." This was submitted by Samuel Jones, and sustained by Hamilton and Lansing. It corresponds with the Massachusetts resolves, and with Marshall's exposition to Virginia. Nor can there be on principle, to the recognition of this immunity as one of those faculties the States had not delegated or ceded to the United States Government, a rational exception.

The States of the Union had maintained the war of the revolution. The delegates to Philadelphia to amend and to reform the confederation were appointed by their Legislatures. Those Legislatures now elect a branch of the Congress of the United States, and thus participate in the confirmation of federal officers and the formation of treaties. They command and train the militia of the Union, and have power to regulate the making of contracts, the law of succession, instruction, the transfer of property, and what relates to domestic and social order and tranquillity. The States have a republican government, a magistracy, civil administration, and a body of people. They belong to a Federal Union, and have interstate relations—as independent and equal States—enduring and indestructible. There is unity, force, duration, rights, faculties, which enable them to be separate, distinct; and constitutions and laws, of which their public power is the minister, and which develop consequences, for the amelioration of the condition of the State, as well as of the Federal Union.

With no particular admiration for the equivocal and undefined words, sovereign, national, federal, republican, or democratic, we can safely affirm that a State thus existing and thus connected ought not to be the subject of a judicial writ or warrant, unless her own consent has been plainly given in any manner whatsover.

A general alarm was felt or affected, and the governors of several States brought the subject before their Legislatures, that measures might be taken for averting the danger to which State sovereignty was exposed. But, although the decision was unwelcome, it was not easy to refute the reasons on which it was founded, and the Court seems to have escaped censure. It was not contended that the Court misconstrued the Constitution, but it was insisted that the jurisdiction given by that instrument in the present instance ought to be revoked. At the next session of Congress an amendment to the Constitution was prepared, and afterward ratified, declaring that the judicial power of the Court should not extend to suits against a State by a citizen of another State. However wise and just such a jurisdiction may be in theory, it would certainly have been attended with many inconveniences in practice. Cases would, probably, arise, in which the general government would have wanted either the power or the inclination to enforce the decree; a powerful State might have refused to submit to a judgment which it regarded as derogatory to its honor or welfare; and it is not probable that the other States would have been willing to incur the hazards of a civil war from a disinterested love of justice.

Life of John Jay, t. 1, pp. 297, 298.

REMARKS:

Gouverneur Morris expressed the opinion that the inconveniences to result from attempts to enforce a judgment would be insuperable. He approved of the adoption of the eleventh amendment.

3 Morris' Writings, 266.

The argument in the Federalist becomes more powerful by the circumstances which surround us that serve to illustrate it. "Whoever considers the populousness and strength of the several of these States singly at the present juncture, and looks

forward to what they will become, even at the distance of half a century, will at once dismiss as visionary any scheme which aims at regulating their movements by laws, to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities. A project of this kind is a little less romantic than the monster taming spirit attributed to the fabulous heroes and demigods of antiquity.

Federalist, No. 16, p. 71, 72.

The cases before the Court have been commenced to enforce a contract, and by a judicial decree, to control the future administration of Louisiana as a sovereign. The case presented is the very case which dictated the eleventh amendment, and was designed to be placed outside of judicial power. Suits to enforce demands upon the Treasury of a State, and requiring the use of the power of taxation. The State denies the jurisdiction in the cases of the Syndicate, for that the purpose of the suit is to defeat that amendment. In the words of Lord Coke, "the execution is the life of the suit," and in these cases the executory process is to be employed to make a seizure of money raised by taxation, and deposited in the Treasury. Chief Justice Jay was disposed to exercise a jurisdiction against the United States, and hints this in his opinion in the case of Chisholm, but then he hesitates, and finally concludes he cannot have his execution carried into effect. But he says, against a State, "the Court could call on the national executive for aid." The General Court of Massachusetts, under the inspiring force of her Chief Magistrate, answered that this was "unnecessary and inexpedient—and IN ITS EXERCISE dangerous to the *peace, safety, and independence of the United States, and repugnant* to the first principles of a *federal government.*"

B.

Cohens vs. State of Virginia.

The question decided in this case was, that a writ of Error might issue in a proper case under the 25th section of the Judiciary Act of 1789, although the prosecution was against the defendant by the State for a violation of her laws, the eleventh amendment did not affect the appellate jurisdiction under that section of the Judiciary Act.

Extract from Opinion given in Cohens vs. Virginia, 6 Wheat, 406.

It is a part of our history that at the adoption of the Constitution, all the States were greatly indebted, and the apprehension that these debts might be prosecuted in the Federal Courts formed a very serious objection to that instrument. Suits were instituted, and the Court maintained its jurisdiction. The alarm was general, and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State Legislatures. That its motive was not to maintain the sovereignty of the State from the degradation supposed to attend a compulsory attendance, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State.

The jurisdiction of the Court still extends to these cases. We must ascribe the amendment then to some other cause than the dignity of the State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the

jurisdiction of the Court in these cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is that it was intended for those cases, and those only, in which some demand is made by an individual in the Courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its own convenience in the adjustment of its debts or other claims upon it. But no interest could be felt in so changing the relations between the whole and its parts as to strip the government of the means of protecting by the instrumentality of its Courts from active violation.

REMARKS:

This historical statement is made in a case which came from Virginia, and was argued by counsel appointed by that State. In the Virginia convention there was a debate on the judiciary clause, from which I have quoted, and there was anxiety and apprehension expressed lest the judiciary clause in the Constitution would be construed so as to allow of the suability of a State. Patrick Henry opposed the Constitution, and raised as much of alarm and as many doubts as he could, and had a large support. Madison and Marshall allayed the apprehensions then, and in that convention assured the members. It is to this, we suppose, the Chief Justice alludes. It cannot be affirmed that when Massachusetts resented the writ served on her, or that when Virginia *unanimously* supported the movement of Massachusetts, this was from any morbid fear as debtor States. I assume that their resolutions tell plain truths of the causes of the amendment. The Chief Justice, in 1793, had not been in the Congress or councils of the United States, and the year previously was a member of the State Legislature. Patrick Henry,

during the convention, and for some time after, was implacable. The appeals in the convention often went to the verge of legitimate discussion on the subject of the debts. I suppose this made the impression expressed in this paragraph.

C.

FLETCHER VS. PECK, 6 CRANCH, 87–148.

I have examined the decisions that have been made in this Court in which the limits of the judicial power have been most nearly approached in cases wherein the States or their officers have been concerned as parties, on the record or in interest. This case is anomalous, difficult to appreciate or explain, and was but an *incident* occurring in the complicated, acrimonious and protracted controversy, finally settled by an act of Congress, approved 31st March, 1814, 3 Stats. at Large, ch. 39, p. 116, with scarcely a reference to the judgment in this case, or to the opinion of this Court. The controversy originated in a sale, by the Governor of Georgia, 7th January, 1795, under the authority of a legislative act passed a few days before, of the western Territory of Georgia, to four land companies, for the sum of $500,000. The deed conveyed all the lands within the present States of Alabama and Mississippi north of the 31st degree of north latitude, the southern boundary of Georgia and the United States. An investigation afterwards made by James Madison, Albert Gallatin, and Levi Lincoln, members of the Cabinet, and report of testimony under authority of Congress, demonstrates that the legislative act was obtained by the bribery of every voter for the act in the Legislature, except one. The succeeding Legislature impelled by an irresistible torrent of popular indignation, passed a rescinding act the 13th February, 1796, directing the money to be returned; the act in the archives to be burnt by the sheriff before the State House in presence of

the Legislature and spectators; the journals to be expunged of notices of it; that Courts should not hear it, lawyers plead of it; clerks record any title under it, juries render any verdict, &c., &c. The sum of $310,695.15, was refunded to releasing purchasers. Others hurried northward and sold their titles to New England, New York, and European purchasers, prior to the 13th February, 1796. One sale bears date that day. In the future controversy these claimed to be *bona fide* purchasers, without notice of anything to awaken suspicion or notice either of fraud or the popular fury.

1 American State Papers, Public Lands, No. 74, pp. 132, 152, 159.

President Washington communicated the sale to Congress as a grave circumstance. In 1798, Congress erected a territorial government over this domain, as if the State of Georgia had transferred sovereignty and jurisdiction. In Congress acts were passed directing an investigation of all the facts, and a report upon their legal effect. That report caused the passage of an act for the commissioners to obtain the title of Georgia. On the 24th April, 1802, Madison, Gallatin, and Lincoln, signed for the United States the articles of cession by Georgia; also signed by Abraham Baldwin, James Jackson, and John Milledge, for Georgia. In these articles the same western territory was transferred to the United States, and one of them appropriates not to exceed 5,000,000 of acres to satisfy, quiet, and compensate all claims on the territory conveyed.

1 American State Papers, Public Lands, No. 69, p. 125.

In the early part of 1803, a committee of the New England claimants took notice of this agreement, approved its conditions, and suggested modes of appropriation of the appropriated land. The names of Perez Morton, John Peck, and others, are signed to this. State Papers, supra, 159. In March, 1803, a statute was passed for occupancy, survey, and sale of lands;

chance for the 50,000,000 acres of land would have been lost. Notwithstanding the great zeal of plaintiffs to gain their suits, they are often disappointed; but never did I hear of one who wished to lose his suit, but he was in some manner accommodated. I never did see a Judge with ingenuity and talents enough to overcome and defeat both parties and their attorneys, and award a judgment to the plaintiff contrary to their united efforts." Peck and his counsel in the Circuit Court, Perez Morton, appear conspicuously in the proceedings, and signed memorials in 1803, and 1814, for a settlement. Fletcher, a brother-in-law of Peck, never appears at all—from 1803 to 1814. Mr. Harper appears as an original member of the Georgia land company in January, 1795—before the deed was made. The deed in which the covenants appear, was executed in May, 1803, a few weeks after the act of March, 1803, in which the proof of claims was allowed to be made. The suit before the Court was commenced in June, 1807, in the Circuit Court at Boston, and the judgment rendered in October, 1807, and filed in this Court in January, 1808. The judgment was rendered in 1810. The case at the time rested under suspicion as expressed by Justice Johnson in his opinion at that time. This was felt in 1814.

EXTRACT TAKEN FROM THE OPINION IN FLETCHER VS. PECK.
6 CRANCH, 87–148.

"The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a *principle originally engrafted* in that instrument, *though no longer a part of it.* The Constitution as passed gave the Courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the Courts of the United States for that violation. Would it have been a defence in such a suit to say that the State had passed a law absolving itself

from such a contract? It is scarcely conceivable that such a defence could be made. And yet if a State is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. *This* feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated."

6 Cranch, 139.

In 1810, when this opinion was delivered, the United States had been, since April, 1802, in possession of this vast domain, and in March, 1803, Congress had legislated, claiming every right as sovereign and proprietor over every acre of it. On a deed purporting to be framed subsequently to this possession, this proprietary right of the United States to every one of these fifty millions of acres, upon demurrers and rulings, one arranged in this Court, was called in question, and decided adversely without any representative of the United States being present. Georgia had ceased to be a claimant since April, 1802. There were none to respond to any adverse claimant but the United States. The subject had been under the direction of three statesmen of eminence, members of the executive government, and acting under Congress, as an administrative question of extraordinary magnitude and interest. Congress, under the Constitution, which gives power to make the needful rules and regulations, had legislated and finally did, in the manner set forth in the compact of 1802, *satisfy*, *compensate* adverse claimants, and quieted the title to their own content, as shown in the State papers. It illustrates the argument we have made as to the necessity of leaving a vast number of such questions in such hands.

The paragraph I have cited I interpret to mean this and no more: That at one time the Constitution gave the power to the Supreme Court of the United States to receive suits and to judge them, brought by individuals against the States.

In that period the States would answer as civil corporations, and that her will, by means of a legislative or any other Act, would not have been an absolution from the performance of her contracts before the Court. The author states that the feature of the Constitution he alludes to no longer appeared in the Constitution. Certainly we have no precedent to aid us as to what the Court would have done in the case supposed. But the fact is, that not an acre of all the domain described in the deed made by the Governor of Georgia, on the seventh of January, 1795, under the Act of the Legislature passed on the first day of that year, has been held for one hour under that deed. All titles are derived from the United States by reason of the title acquired in April, 1802, from Georgia.

The only memorial of that Act is found in the Constitution of Georgia, made in 1798, which requires every title to an Act to state the object. The title of the Act of the first of January was shamefully deceptive.

D.

Acts No. 3 and No. 4 of Louisiana.

I.

The seventh section of Act No. 3 and the article one of No. 4 referred to in the bill, provides for the collection of a special tax of a fixed rate, annually, until the principal and interest of the issue of bonds be paid. The bonds become due in A. D. 1914. The Auditor and Treasurer and Board of Liquidation were required to collect these taxes without more legislation and to apply them for the purpose designated. In 1879, by the debt ordinance these were repealed and other arrangements were substituted. The claim here is that the law remains operative as a contract.

It can hardly be imagined that there is any other designation for it in any connection with the Constitution of the United States,

or in a Court of the United States. The inquiry has been made as the power of the Court to deal with it as a contract.

II.

Montesquieu in a chapter which has impressed the Constitutions of the United States, Federal and State, says there can be no liberty where the power of taxation is deposited with the executive department. It is in peril, he says, if the Legislature imposes taxes for long periods or irrevocably, instead of from year to year as occasion demands. That the refusal to convene the Legislature, or when the sessions are uncertain or irregular or at distant periods involve the same dangers. The same opinions are expressed by Parsons in a writing published with his memoirs.

Montesquieu, Esprit des Lois., Liv. XI, ch. VI.
Memoir of Parsons: Essex Result, p. 373.

The Constitutions of the United States provide for regular sessions of Congress and Legislatures; that money bills must originate with the popular branch and that no money shall be drawn which has not been appropriated. The word "contract" in the American Constitution is assumed to have the same force and extension as *spiritalis potestas* in the Papal Constitution, and to confer *summam potestatem de temporalibus rebus.* The fundamental principles of organic law, and of State administration are to be overturned, and the marshals, receivers and deputies of the Courts, are to be placed in the control of the revenue and to be independent of all except a Master in Chancery. The answer to be made is, that this was settled in this Court before the century commenced.

The case of Chisholm vs. Georgia was a suit for a money demand. The Court rendered a judgment by default and allowed a writ of inquiry. The writ was not sued out or executed. "This cause and all the other suits against States were swept at once from the records of the Court by the amend-

of the Constitution."—2 Dallas, 480. There were suits for land as well as suits for the performance of contracts that were cast forth from the Court. Chief Justice Marshall in Ogden vs. Saunders, adverting to this subject, says: "To afford a remedy is certainly a high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to just reproach of the world. But the Constitution has not undertaken to enforce its performance. It prohibits the States from passing any law impairing the obligation of contracts, it does not enjoin them to enforce them." This plain question was submitted to the Supreme Court and sovereign authority in the Union after the decision of the Court on the motion made in the case of Chisholm: Shall the tribunals of the United States have power to enforce against the States their contracts or claims on their property?

The answer is recorded as a part of the supreme law of the land. No State in the Union, nor perhaps citizen would have contemplated but with amazement and dismay, a constitution that under interlocutory orders the State Treasury could be controlled by writs of mandamus and of injunction and that warrants were to be made by subordinate officers of a Court of first instance. This is the aim in these proceedings.

E.

Lord Hammond's Dispatch, 26 April, 1871.

Her Majesty's government are in no way party to private loan transactions with foreign States. Contracts of this nature rest only between the party borrowing and the capitalists who enter into them as speculative enterprises, and who are content to undertake extraordinary risks in the hope of large contingent profits. Further, it is scarcely necessary to point out the endless troubles which would arise if the active intervention of

England were exerted to redress the grievances of bondholders. Independently of the expense which would be necessarily incurred, and the risk of international complaints, forcible measures if adapted towards small States, which for the most part are the ones complained of, would subject this country to grievous imputations. For such and other reasons, her Majesty's government have determined as a matter of wise policy, to abstain from taking up as an international questions the complaints of British subjects against foreign States which fail to make good their engagements in regard to such pecuniary transactions, or to interpose, except by good offices between bondholders and the States by which they have been wronged.

Turkish Loans, 225 Hansard Deb., 202.

F.

National Bankruptcies; Adulterate Coin and Currency.

I.

At the end of the 1st Punic war the coin had been debased to one-sixth of the weight it had at the beginning of the war. The coin As weighed a full pound at the beginning of the war, and was reduced to two ounces. In the second war all moneys of minors, unmarried women, and trust moneys, were taken and paid for with bills. These were actually a paper currency.

2 Arnold's History of Rome, 177-8, 351.

England.

The Jews, like the forests, were the special property of the King, and as property worthy of careful cultivation, they were exempted from general taxation to be tallaged by the King. Henry III assigned the whole body of the Jews as security for a loan.

2 Stubbs' Cons. His., 530, 531.

Henry VIII loaded the people with oppressive taxes, and he pillaged them by loans which it was known he never meant to pay. The Parliament authorized his oppressive taxes, and absolved him from the payment of his debts.

1 Russell, Mod. Europe, p. 394.

In France, under the monarchy, the livre was successively debased so as to be but one 87th part of what it contained of silver under Charlemagne. The falsification of money continued till within the reign of Louis XV. In Great Britain there was less of this than elsewhere. That the fall there has been only to the third of its original value, and since the time of Elizabeth there has been no alteration of the coin. In the year 1797, the suspension of specie payments of the Bank of England was authorized. The bills were a legal tender during the period of twenty-two years.

Ramel's liquidation in France took place by decree of 30th September, 1797.

The inscriptions on the book of the public debt were reduced to one-third of their amount. Two-thirds of the debt was paid in bills receivable in payment of purchases of public domain. These were sold at a discount of 80 per cent. on their issue, and soon became worthless.

Louis upon his ascension to the throne of Holland, repeated Ramel's liquidation—that is he erased two-thirds of the debt.

Upon the restoration of William I, he assumed to pay the principal, without interest, past or future, of the debt reassumed and reduced interest to 2½ per cent. annually on the public debt.

The Austrian settlements were still more to the disadvantage of the creditor. The depreciation of paper money was as 1 to 12. In Russia 1 to 4.

In my briefs I have referred to the financial arrangements of the United States.

The necessity for a public declaration of bankruptcy has, as we have seen, been frequent. The remedies for such a condition

must necessarily appear violent. But if the disease be exhausting, and there be no cure but by an interference with the public contracts, this must take place or the commonwealth must perish. When this severe and painful remedy is administered, public indignation should turn upon those who brought the State into it, not against those on whom is thrown the burden, to deliver the State from it. There will be complaints and there will be suffering, as there must be whenever a State is exposed to a great calamity.

The greatest din has always come from stock jobbers and usurers, who roar aloud until some Nehemiah becomes very angry when he heard the cry and their words. Then he says: I consulted with myself, and I rebuked the nobles and the rulers, and said unto them, Ye exact usury, every one of his brethren; and I set a great assembly against them.

Bolingbroke says to a similar class in his time what seems to be applicable to this one: "Let these men learn, therefore, to submit, and to reason, as old Bateman did when the reduction of interest was agreed to in the year 1717. He told my Lord Stanhope he was glad this resolution had been taken, because, though his interest was diminished, he should think his principal more secure than ever."

C.

WILLIAM VASSAL, *Complainant,*
vs.
THE COMMONWEALTH OF MASSACHUSETTS, *Defendant.*
} IN EQUITY.

[SEAL.]

The President of the United States, To John Hancock, Esquire, Governor, and James Sullivan, Esquire, Attorney General of the Commonwealth of Massachusetts.

GREETING.

For certain causes offered before the Supreme Court of the United States holding Pleas in Equity, we command and strictly enjoin you that laying all other matters aside and notwithstanding any excuse you be and appear on behalf of the Commonwealth of Massachusetts before the said Supreme Court of the United States, holding Pleas in Equity on the fifth day of August next ensuing, at the City of Philadelphia being the Seat of Government, to answer concerning those things which shall be then and there objected to the said Commonwealth and do further and receive on behalf of the said Commonwealth what the said Court shall have considered in this behalf. And this you may in no wise omit under the Penalty of four hundred Dollars.

Witness the honorable John Jay Esquire Chief Justice of the Supreme Court of the United States at Philadelphia, the Eleventh Day of February in the Year of Our Lord one thousand seven hundred and ninety three and of the American Independence the Seventeenth.

SAM BAYARD, *Clk*
of ye Sup: Court of the U. States.

108-76

FILED
OCT 10 1882
JAMES H. McKENNEY, CLK

IN THE

Supreme Court of the U. S.

APRIL, 1882.

THE STATE OF NEW HAMPSHIRE, No. 4,
THE STATE OF NEW YORK, No. 6,
JOHN ELLIOTT, ET AL., 2 CASES, 845, 846.

vs.

THE STATE OF LOUISIANA AND HER EXECUTIVE OFFICERS.

ARGUMENT OF JOHN A. CAMPBELL,

Of Counsel for Defendants.

JOHN A. CAMPBELL,
Of Counsel for Defendants.

J. C. EGAN,
Attorney General, Louisiana.

J. MURPHY & CO., PRINTERS AND STATIONERS, BALTO.

Supreme Court of the United States.

17th April, 1882.

THE STATE OF NEW HAMPSHIRE, No. 4.
THE STATE OF NEW YORK, No. 6.
JOHN ELLIOTT, ET AL., 2 *Cases*, 845, 846.

vs.

THE STATE OF LOUISIANA AND HER EXECUTIVE OFFICERS.

Argument of JOHN A. CAMPBELL, of Counsel for the Defendants.

May it please the Court:

Four cases have been set down for argument and for judgment at this time under the order of this Court. On the part of the plaintiffs in all of these there is a demand that the State of Louisiana is their debtor upon written evidence of indebtment of the same import arising out of the same contract, and for the payment of these debts money has been collected by the State and is in her treasury applicable to that payment. They ask of the Court judgments or decrees to require the payment to be made from the money in the treasury and to affirm the validity and binding operation of their demand.

Two of these suits were commenced in this Court by the States of New Hampshire and New York against the State of Louisiana and her executive officers. The remaining two were commenced by individuals in the Circuit Court of the United States at New

Orleans against the executive officers of the State, the State not being a party. The plaintiffs in these cases have the same cause of suit supported by similar evidence and demand a decree for compulsory payment from the same fund deposited in the treasury.

They demand payment of coupons of interest due in January, 1880, which were detached from bonds issued by the State. The primary question in all of the cases is, does the judicial power of the United States as vested in their Courts extend to the allowance of the demands of these parties?

It was asserted shortly after the organization of the Court that any individual belonging to any State of the Union or any subject of a foreign State, might maintain a suit here against any State of the Union, of which he was not a citizen. Several suits were brought in the Court by citizens and by aliens against States. The case of Chisholm vs. Georgia, 2 Dall., 419, was argued upon a protest of Georgia against the jurisdiction. The suit was for goods sold and delivered to persons who are called in the pleadings agents of the State, for account of the State in the year 1777. Another case was brought by aliens and citizens against Virginia founded upon an old grant issued by the King of Great Britain at an early period for lands in the western part of Virginia. The Court announced a judgment in favor of the jurisdiction of the Court in the early part of the year 1793.

In the summer of that year Wm. Vassall commenced a suit against Massachusetts and the subpœna in chancery was served upon the Governor—John Hancock. The Governor convened the General Court of the State to obtain their counsel and directions. He submitted the process and the opinions given in the case of Chisholm by the Justices of this Court and he addressed the General Court and among other matters said: "When the Constitution of the United States was proposed to the people's consideration he then was and was still impressed with the necessity of a more perfect union of the States than at that time existed, and

therefore exerted the share of influence which he possessed in favor of its being adopted. He then considered it as being by no means explicit in the description of the powers intended to be delegated but trusted that the wisdom of the people would very soon render every part of it definite and certain. The idea that it is dangerous to examine systems of government, and to compare the effect produced by their administration with the principles on which they were raised, is inadmissible among a free people. If the people are capable of practicing on a free government, they are able without disorders or convulsions to examine, alter, and amend the systems which they have ordained. And it is of great consequence to the freedom of a nation to review its civil constitution, and to compare the practice under it with the principle on which it depends. The tendency of every measure, and the effect of every precedent ought to be scrupulously attended to, and critically examined. This is the business of the people and can never be by them entrusted to any other persons. A consolidation of all the States into one government would at once endanger the nation as a Republic and eventually divide the States united or eradicate the principles which we have contended for. It is much less hazardous to prevent the establishment of a dangerous precedent than to attempt the abolition of it after it has a place in a civil institution. Your fellow-citizens anxiously await the event of your deliberations on the important business before you."

This extract from the speech of Governor Hancock illustrates the enlarged catholic and unselfish spirit in which this movement was commenced, and the counsels of that statesman are delivered with singular felicity and grace.

After a fortnight spent in deliberation, the General Court returned to their chief magistrate the following resolutions and address as the result:

"FRIDAY, *September 27th, 1793.*

"*In Senate.* WHEREAS, a decision has been had in the Supreme Judicial Court of the United States, that a state may be sued in

the said Court, by a citizen of another State, which decision appears to have been grounded on the second section of the third Article in the Constitution of the United States.

"*Resolved*, That a power claimed, or which may be claimed of compelling a State to be made defendant in any Court of the United States at the suit of an individual or individuals, is in the opinion of this Legislature unnecessary and inexpedient—and in its exercise, dangerous to the peace, safety and independence of the several States, and repugnant to the first principles of a Federal Government.

"*Therefore resolved*, That the Senators from this State in the Congress of the United States be, and they hereby are instructed, and the Representatives requested to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States, as will remove any clause or article of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.

"And his Excellency the Governor is hereby requested to communicate the foregoing Resolves to the Supreme Executives of the several States to be submitted to the consideration of their respective Legislatures."

"*To his Excellency* JOHN HANCOCK, *Esq., Governor of the Commonwealth of Massachusetts.*

"*May it please your Excellency.*

"The resolution adopted upon the subject on which the Legislature has been convened, will convince your Excellency how justly we appreciate the vigilance and propriety of your conduct on this interesting occasion.

"With respect to the suit of William Vassall against the Commonwealth no answer will be made,—but at the same time,

it may not be improper to observe, that if he shall exhibit to the Legislature, an equitable claim against the commonwealth, in the manner heretofore practiced, justice will be extended to him, in common with all others.

"The Legislature need only add, Sir, that they earnestly wish for the happy recovery and re-establishment of your Excellency's health, as a relief and comfort to your friends, and a blessing to your country."

The Governor died a few days after these were received by him, and with his office the duty was devolved on Samuel Adams, Lieutenant-Governor, to communicate them to the other States of the Union. This he did in a letter which I have not been able to procure, but which I remember to have read in print and which expressed a hearty concurrence in the result.

In the autumn of the same year the Legislature of Virginia responded in a resolution expressive of an *unanimous approval* of the conclusions expressed by Massachusetts and concurring in her recommendation.

"*Resolved*, That a State cannot under the Constitution of the United States, be made a defendant at the suit of any individual or individuals, and that the decision of the Supreme Federal Court, that a State may be placed in that situation, is incompatible with and dangerous to the sovereignty and independence of the individual States, as the same tends to a general consolidation of these confederated republics.

"*Resolved unanimously*, That the Senators representing this State in the senate of the United States, be and they are hereby instructed, and the Representatives requested to unite their utmost and earliest exertions with the Senators and Representatives from other States coinciding in sentiment with this State to obtain such amendments in the Constitution of the United States as will remove or explain any clause or article of the said

Constitution which can be construed to imply or justify a decision, that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States; and that the Governor is hereby requested to communicate the foregoing resolve to the Supreme Executives of the several States to be submitted to the consideration of their respective Legislatures. This was agreed to by the Senate, on December 3d, 1795. This Act of the Legislature is reported in Statutes-at-Large, Vol. 1st, 1792 to 1795, page 284."

We have not found any declaration by the State of Georgia at this stage of the procedure, of her discontent, nor of angry opposition. She adopted the amendment as declarative of the meaning of the Constitution and as indicative of the only meaning it could have consistently with the rights and dignity of the States. In 1794, a resolution framed upon the resolutions of Massachusetts was offered to the Senate by one of her senators, (Caleb Strong), for the incorporation into the Constitution of an article which became the 11th Amendment of the Constitution; the resolution was adopted as offered, without any change, by a vote approaching to unamimity. I have referred in my brief to the proceedings of Congress and to the weight of the Senators and Representatives who agreed in its support. I have done this for the reason that in some of the opinions delivered in this Court in the past time, allusions to this history and to the cause of this amendment have been made which I do not agree to, as an exact interpretation of the history and as calculated to undervalue the force of the movement. I am not able to find anything which diminishes in any manner the magnanimous, constitutional and patriotic bearing of Hancock and Adams, or the wisdom, counsel and sobriety of the General Court, nor which denotes the absence of similar characteristics and qualities from the Legislatures or the Congress which adopted the amendment as a part of the supreme law of this

land, or that proves their motives to be other than they have declared.

Before the Constitution had been ratified, and while it was under discussion, Hamilton, in a number of the Federalist, examined the Constitution to find its meaning on the subject. An extract from the number is copied into the brief, and contains all that can be wanted on the subject. Brief, p. 12. I will read it: —

"After the submission of the Constitution to the States for adoption, there were apprehensions or suggestions expressed, which are noticed in the 81st number of the Federalist, prepared by Hamilton. 'I take occasion to mention,' he says, 'a *supposition* which has excited alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another State would enable them to prosecute that State in the Federal Court for the amount of those securities—a suggestion which the following considerations prove to be without foundation. It is in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind.

"'And the exemption as one of the attributes of sovereignty is now enjoyed by the government of every State of the Union.

"'Unless therefore there is a surrender of the immunity in the plan of the convention, it will remain with the States and the danger intimated will be ideal. The circumstances which are necessary were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles then established will satisfy us that there is no color to pretend that the State governments would, by the adoption of the plan, be divested of the privilege of paying their debts in their own way, free from any constraint but that which flows from the obligations of good faith. The contracts between a nation and

individuals are only binding on the conscience of the sovereign and have no pretence to a compulsive force. They convey no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State. And to ascribe to the Federal Courts, by mere implication and in destruction of a preëxisting right of the State government, a power which would involve such consequences would be altogether forced and unwarrantable.'—*Federalist*, No. 81."

The Convention of New York had recommended an amendment which corresponds very nearly to the 11th Amendment and which had the vote of Hamilton and Livingston. The debates in the Virginia Convention have been reported with more care than those of any other Convention. The judiciary clause was examined severely by the opponents of ratification. The debate is interesting as containing the opinions of her most prominent actors in the work of framing the Constitution.

"George Mason and Patrick Henry afterwards made use of this suppositious case with power in the Virginia convention. Referring to the clause, 'To controversies between a State and citizens of another State,' Mason asked, 'how will jurisdiction in this case do? Let gentlemen look to the westward. Claims respecting those lands, every liquidated account, or other claim against this State will be tried before a Federal Court. Is this not disgraceful? Is this State to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the State to be arraigned like a culprit or private offender? I think this is perfectly unnecessary.'

"3 Ell. Deb., 480, (1st edition.)

"Patrick Henry reinforced Mason with his vehement invective and eloquence, and concluded a reply to Madison by the remark:

'It would ease my (his) mind if the honorable gentlemen would tell me the manner in which money should be paid, if in a suit between a State and individuals the State were cast.

"'The honorable gentlemen perhaps does not mean to use coercion but some gentle caution. I shall give my voice for the federal cognizance only, where it will be for the public liberty and safety.'

"3 Ell. Deb., 493, (1st edition.)

"Madison replied: 'The federal jurisdiction in controversies between a State and citizens of another State had been much objected to, and perhaps without reason. It is not in the power of individuals to call any State into Court. The only operation the clause can have is that if a State should wish to bring suits against a citizen it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State Courts, * * * It appears to me that this clause can have no operation, but to give a citizen a right to be heard in a Federal Court; and if a State should condescend to be a party, this Court may take cognizance of it.'

"3 Ell. Deb., 485–6."

"Marshall replied to the objections. He said: 'with respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of a Federal Court. It is not rational to suppose that the sovereign power shall be dragged before a Federal Court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. I see a difficulty in making a State defendant which does not prevent it being plaintiff.' 3 Ell. Deb., 504–5 17 How., 518."

The effect of the 11th Amendment to the Constitution upon the cases then pending in the Court, was announced by the Court in Hollingsworth vs. Virginia, 3 Dall., 378, after argument. It was contended in argument that it was prospective and did not operate upon any suit on the docket. It was argued to the contrary, that "the amendment was explanatory in substance as well as in language. * * * It was the policy of the People to cut off that branch of jurisdiction which had been supposed to authorize suits of individuals against States." The unanimous opinion of this Court was: "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of a foreign State." The Reporter concludes his second volume with the statement "that all the suits against States were *swept* at once from the records of the Court by the amendment to the Federal Constitution, agreeably to the unanimous opinion of the Judges. 2 Dall., 480, (note). There never was a trial of any one of the cases commenced against States, nor do we find any appearance entered for them, nor plea nor answer filed, nor any final order rendered in any. They sunk silently from the Court like lead into the mighty waters. From this date of 1798 no State of the Union was summoned to the bar of this Court for a quarter of a century for any cause; or by any suitor under a claim of original jurisdiction. The case of New Jersey vs. New York, 5 P., 284, was the first instance. There seemed to have been an opinion in Congress and among the States that jurisdiction had not been conferred upon this Court to determine controversies arising between States by any act of Congress, and the judicial power of the United States had not been delegated in such cases to the Court. In 1814 the State of Kentucky addressed a memorial to Congress to legislate on the subject so that a disputed boundary might be settled with Tennessee. This application was renewed from time to time, and in 1819

there was an animated debate in the Senate in which Mr. Crittenden participated. The bill he supported was rejected. The debate showed an indisposition to confer the power from a dread of consequences, and that an urgent case must arise for the grant of the power. The opinion was that the delegation of such a power would be fraught with mischief. In 1822 this discussion was renewed upon a bill introduced by senators from New Jersey to allow of a suit with New York, but which was general in its application, in respect to property and jurisdiction in the waters of the Bay of New York. A summary of the debate is reported in the Annals of Congress. The Senate proceeded to the consideration of the bill introduced by Mr. Dickinson prescribing the mode of commencing and deciding controversies between States. Mr. Dickinson delivered an argument of considerable length in support of the bill for the purpose of showing the expediency of the measure, and entering a good deal into the merits of the controversy concerning boundary and the extent of their respective jurisdictions. Mr. Van Buren also entered at large into the merits of the controversy and argued there was no necessity for adopting this bill inasmuch as the question between the States could without any such law, be brought up into Court, the same as between individuals. The next day, Mr. Rufus King of New York, spoke at considerable length to show that the bill was unnecessary, inexpedient and ought not to pass. Mr. Southard replied: Mr. Van Buren also again spoke. Mr. Barbour and Mr. Macon respectively without going into the merits of any particular controversy, submitted their reasons for disapproving of the bill, arguing chiefly that such a bill ought not to pass without some apparent necessity, and as its passage did not seem to be indispensable it would be impolitic as consequences might grow out of it of much political inconvenience. Mr. Dickinson in conclusion observed that although no vote had been taken, he had ascertained the opinion of a number of the members on it, and as the objection seemed to be the general nature of

the bill, he would move an amendment embracing the existing cause of dispute between New Jersey and New York. In the face of this definite, distinct and responsible opinion of Congress it was some years after discovered that the Court had acquired jurisdiction under the judiciary act of 1789, the process, act and the practice in the cases which had been disposed of by the 11th Amendment, 5 P. 284.

This statement of congressional action is submitted to the Court to repel any conclusion that the Constitution of the United States, which sanctions the employment of judicial power in controversies between two or more States was concerned with any expectation or purpose of conducting an experiment whereby wars, conquests, controversies, and disputes among nations might be reduced to the compass of a quiet, amicable and endearing suit before a civil tribunal.

The jurisdiction over such controversies was conferred upon the Congress of the Confederation under an overruling necessity. The Colonies were engaged in a perilous and unequal war at the time. There was not a colony which did not have a boundary unascertained and perhaps disputed. In several of the disputes there was anger, irritation, and a disposition to violence. The King in Council had exercised jurisdiction to arrange and settle these boundaries, though modern jurists question this prerogative, and these decisions were respected and obeyed. The differences of Massachusetts and New Hampshire, and of New Hampshire and New York, were so decided. The territory of Vermont was adjudged to New York, but the settlers deriving titles from New Hampshire refused obedience. New York relinquished her title for a small indemnity, and so Vermont became a State.

1 Sparks' Life of G. Morris, pp. 208–9, note.

Pennsylvania and Connecticut refer their dispute to Congress. The judgment was for Pensylvania, but the judgment was not accepted until Connecticut was compensated by a grant of territory in Ohio.

Virginia was relieved from controversy by ceding the North West territory to the United States, but Maryland had a dispute with her which was not adjusted until now. The dispute between Tennessee and Kentucky, was one that originated between North Carolina and Virginia; Georgia had boundaries to settle with South Carolina, Tennessee, and with Spain. The Confederation was substituted for the King and his Council to determine such differences, and the power conferred in this Court, the history of Constitution shows was another act of substitution. There is no serious discussion on the subject in the course of that history. When we consider the structure of the Constitution, the nature of the prohibitions of treaties, alliances, confederations, agreements, compacts, imposts and of all belligerent faculties, and the delegation to Congress of power over commerce, navigation and interstate relations as to fugitives from justice and service, and of the certification of laws and records, it must appear that a dominant purpose was that the controversies for arbitrament should be as few as possible. It would seem to follow that suits commenced and prosecuted by a State or States of the Union against other States in favor of the members of the States upon such invitations as New Hampshire and New York have extended, plainly contradict the aim and intent of the authors of the Constitution in the allowance of this power to the general government. A State enjoying an immunity from suit under the Constitution in every other case, except one of controversy between herself and another State, could not have conceived of a delegation to that other State an authority to find controversies, which she might abet or maintain for her pleasure or her profit. The grant made is not to the State nor for the State. The judicial power is delegated to the United States and for the general good. This judicial power is prohibited to the United States in respect to individuals, it is limited to controversies between States. Controversies immediate, direct, arising between the States.

the bill, he would move an amendment embracing the existing cause of dispute between New Jersey and New York. In the face of this definite, distinct and responsible opinion of Congress it was some years after discovered that the Court had acquired jurisdiction under the judiciary act of 1789, the process, act and the practice in the cases which had been disposed of by the 11th Amendment, 5 P. 284.

This statement of congressional action is submitted to the Court to repel any conclusion that the Constitution of the United States, which sanctions the employment of judicial power in controversies between two or more States was concerned with any expectation or purpose of conducting an experiment whereby wars, conquests, controversies, and disputes among nations might be reduced to the compass of a quiet, amicable and endearing suit before a civil tribunal.

The jurisdiction over such controversies was conferred upon the Congress of the Confederation under an overruling necessity. The Colonies were engaged in a perilous and unequal war at the time. There was not a colony which did not have a boundary unascertained and perhaps disputed. In several of the disputes there was anger, irritation, and a disposition to violence. The King in Council had exercised jurisdiction to arrange and settle these boundaries, though modern jurists question this prerogative, and these decisions were respected and obeyed. The differences of Massachusetts and New Hampshire, and of New Hampshire and New York, were so decided. The territory of Vermont was adjudged to New York, but the settlers deriving titles from New Hampshire refused obedience. New York relinquished her title for a small indemnity, and so Vermont became a State.

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The origin of the two suits, that of New Hampshire and that of New York, has been ascertained by the testimony taken in the suit. New Hampshire and New York have extended invitations by legislative acts to their citizens to make their assignments to the States, to arrange with the attorney general for the payment of costs and expenses so as to spare the treasuries of those States, and that he shall bring these suits or suffer them to be brought in the name of the State. The creditor is to be the sole beneficiary, the *dominus litis*. The constitutional order of this Court established by the supreme law of the land and the practice of the Court as framed to fulfil the Constitution, we have answered forbids suits thus commenced. The judgments of the Court establish that the government of the United States cannot enlarge the original jurisdiction of this Court.

The jurisdiction is defined and limited to cases *between* designated persons. The creative power of the States and people acting under the Constitution must be resorted to before any new class of suits can be heard here.

The Statutes of New Hampshire and New York have affected, so far, only three or four persons of those States who have accepted the terms of the invitation, and are substantially the plaintiffs in the two suits. Those States confessedly have no interest in the decrees to be made. Nor have the millions of inhabitants within their boundaries. The Court has determined that individuals who have no legal standing in the Court must not come by any covert or crooked paths into it. The Court is employed with subjects of jurisdiction of importance and difficulty by the assignment of the People of the United States, and no contempt can be more flagrant than that of States or individuals succeeding by artful contrivances to impose other subjects of jurisdiction upon the Court, and to which no judicial power in the land is applicable. The cases before the Court have been inducted to the Court by States strong in their population, wealth, resources, pride and passions, claiming to employ the judicial power of the Union, not for themselves, but for

individuals to whom they have delegated their name and their faculties for suit. New York, while engaged in the examination of the Constitution of the United States with the question of ratification to be decided, hesitated, and recommended as an addition "that the jurisdiction of the Supreme Court of the United States or of any other Court of the United States to be instituted by Congress, ought not, in any case, to be increased, enlarged or extended by any fiction, collusion, or mere suggestion."

This, and recommendations from other States, were submitted to the First Congress, and were examined for adoption. Many others, similar in their general design, to guard against abusive interpretations, were comprehended under the ninth and tenth amendments reported by the Committees of Congress and adopted by the Congress and the legislatures of the States.

The import of the Statute of New York in this record and of a similar act offered in the legislature of that State at a prior session, is that there is no harm in employing fiction, collusion, or suggestion to bring suits into this Court. When New York brought her bill into this Court with an averment that she was the owner, bearer and holder of bonds issued by Louisiana, there was FICTION. When she sent forth invitations to her citizens to bring their evidence of debt to her attorney general, and to make an assignment to her of the bonds or coupons, and that the attorney general should bring a suit or allow a suit to be brought in this Court in her name, and that the assignors might conduct the suit and bear the burden of costs and expenses, this was COLLUSION. When the Court is addressed with an argument that this is a rightful jurisdiction eminently proper to be exercised, this is *mere* SUGGESTION. This Court is habitually called on to observe the morality contained in the proposition of New York to amend the Constitution. The line it prescribes must be observed in the daily labors of the Court. The maintenance of the bounds of common law, equity, admiralty; the hindrance of appeals and writs of error that by Constitution

and Statute ought not to be heard in the Court; the restraint of inferior jurisdictions in their proper limits; the grave questions arising between the States and United States and between the United States and foreign nations, all demand of the Court a steady walk within constitutional and legal bounds, "without *fiction*, *collusion*, or mere *suggestion*." The temptations to transgress from without are manifold. In this case those from without are as follows:

In June, 1878, a bill was introduced into the Senate of New York, entitled, "An act to protect the rights of citizens of this State holding claims against other States," passed the legislature and was submitted to the Governor who disapproved it, and it did not become a law for reasons that are of record, and I have procured and submit to this Court.

On the 18th July, 1879, the act of New Hampshire, contained in the record. This act has the same title as the New York act of the year previously.

On the 15th May, 1880, the act of New York which the Governor vetoed in 1878, was reproduced in New York and became a law. The title is not changed.

In January, 1881, an act with the same title was introduced into the General Court of Massachusetts and referred to the Judiciary Committee of the Senate. The terse report of the committee that "the bill ought not to pass" was concurred in.

The record of the reasons of Governor Robinson for denying his signature to the act in 1878, is submitted to the Court.

STATE OF NEW YORK,
EXECUTIVE CHAMBER,
ALBANY, *June 14, 1878.*

Memorandum in brief of the reasons for disapproving Senate bill No. 292, entitled, "An act to protect the rights of citizens of this State holding claims against other States."

The Constitution of the United States does not permit a citizen to sue a State in the United States Courts. This bill

attempts to evade that provision by authorizing a citizen of this State holding any obligations of other States to assign his claims to the State and to be prosecuted in the name of the State by the Attorney General for the benefit of the individual. In other words, it requires the State to lay down its dignity, its honor and its integrity as a sovereign State of the Union, and to become a collecting agent for speculators in State bonds, or written obligations against other States, and in so doing to evade the constitution and to assume a false position by prosecuting claims in which it has no interest whatever.

(Signed.) L. ROBINSON.

The assignments of claim to the States of New Hampshire and New York of coupons or bonds of Louisiana, amount to a debt of $1,260 in the aggregate, and the assignments were from two persons in the case of New York for four-fifths of the sum: New Hampshire has not disclosed her trustful citizen. The States have not reserved to themselves any pecuniary interest or advantage from the assignments, and have not controlled the suits. The pleadings are prepared by counsel appointed by the assignors. Whatever fruit, whether sweet or bitter, these assignors are to be allowed to gather, the attorney general of each State is the trustee for the assignors and makes up his accounts only with them. Bentham describes a fiction of law as "A falsehood; and the purpose of the invention to be either that of doing in a roundabout way what might be done in a direct way, or that of doing in a roundabout way what the inventor had no right to do at all." This fiction of New Hampshire and of New York belongs to the second class. Were it sustained as only a circuitous mode of asserting a real right, then it will be competent for these States to enlarge its scope and operation, so as to concentrate in this Court the suits for claims of their respective citizens against all citizens of other States of the Union, and against all aliens who may be within the jurisdiction of the United States.

Acts of the Legislatures of those States procured by the same influence "to protect the rights of citizens of the State holding claims against citizens of other States or aliens" would be a title which would sufficiently disclose the patriotic object of the act under their constitutions. The briefs of the plaintiffs aver that no defendant can inquire as to the validity of any assignment. A half century ago some lawyers in Alabama invented a similar method of increasing their business in the Federal Courts of that State, by the use of a decision in this Court in respect to notes payable to bearer and their exception from the 11th section of the judiciary act. A large number of domestic notes so payable, were sued in the names of foreign holders, upon colorable assignments.

The Legislature of that State changed the signification of the word bearer in a note, and all notes so payable in Alabama at this day are transferable only by endorsement. The act contains a plain and an angry statement of the cause of the change in the law; it was the oppressive and abusive employment of the Federal Court for suits in which there was no jurisdiction, increasing costs and expenses and occasioning vexation. No considerate person can have any controversy with the legitimate operation of the judicial power of the United States, nor with the distribution made of that power among their Courts. There are cases where every portion of it may become necessary to the tranquillity and good government of the United States. But unquestionably neither the stability of the Union, nor the efficiency of the Courts, can be promoted by any tolerance of cunning contrivances of States or of individuals to introduce into them cases, which were not contemplated as suitable for the exercise of the judicial power of the United States.

Among the Romans there was a power among the judges to delegate the exercise of the judicial power.

Prior to the revolution in France, for a long period, offices of judicature were vendible and transmissible as property. The Supreme Court of the United States is ordained by the

people of the United States and the justices are not answerable for any ordinary cause, nor to any ordinary tribunal. Their tenure of office is coincident with the rectitude of their official life, and even their emolument for service is secure from petulant or angry legislation. Their power and responsibility is co-extensive with the Union. Their primary function is to maintain the Constitution and laws and treaties so that just administration may exist.

The Constitution separates the powers of the United States, from those of the States, and the Court is so maintain the distribution judicially. The States of New Hampshire and of New York, like others, have their rights assured in it.

Whatever controversy they have with any other State, may be adjusted. Whatever legal claim either has against a citizen of other States may be brought before this Court. But the Constitution has not appropriated this Court to the personal or private uses of any citizen of either State. But on the contrary this has been impartially withheld from every individual within the United States without an exception. But these States of New Hampshire and of New York through their legislatures have sent to their people a project whereby those citizens along smooth but winding ways, may attain advantages which the Constitution has not conferred upon the United States with their mighty powers, interests and responsibilities, and to no one of their citizens, native or naturalized. It is a cardinal principle in respect to the jurisdiction of Courts, that it cannot be conferred by the consent of the parties, even conjoined with that of the tribunal. The inquiry here presented is whether there be a controversy between the States, or whether there is a simulation of a controversy whereby a State may be called into this Court by an individual. The rational and enlightened view of these acts is represented in the message of Governor Robinson, in New York, and the report of the Committee of Judiciary in Massachusetts.

If these States cannot maintain the suit upon the assignment, made under the acts of their legislatures, New Hampshire is

destitute of any claim. She offers no cause of suit save that arising out of the contract of assignment. New York has set up another claim on the part of all her citizens who are creditors of Louisiana, which will claim some attention hereafter.

II.

Another question arising out of the statements in the bills of the two States has been brought to the notice of the Court through the answers of the defendants. These plaintiffs claim that they are owners, holders, and bearers of the evidence of debt of the State of Louisiana. The bills do not show agreements with the consent of Congress to obtain them; and the answer and evidence establish the manner in which they were obtained and that Congress did not legislate in respect to the subject. The inquiry arises whether States prohibited from making treaties, alliances, confederations, with any State, or agreements, or compacts, without the consent of Congress, in respect even to any subject of difference, can obtain by assignment, causes of difference or dispute, and maintain suits upon them in this Court. The cause of controversy exhibited are notes payable to bearer. The bills allege ownership and possession. It would not be contended that Pennsylvania could lease from New York, the Erie Canal; nor that New York could lease from Louisiana the levee within the city of New Orleans from the State, or agree with Maryland to lend the money to build the Chesapeake and Delaware Canal, nor to subscribe for an issue of bonds put forth by any one of the States, and maintain any suit upon any one of the contracts, we have supposed. Can one State without the consent of Congress, become the creditor or debtor of another State of the Union? If none of these things can be done directly, can one State purchase in the open market the issues of stock made by another State and become the holders of that stock on the same terms with individual purchasers or owners? Can the purchasing State of such stock

or negotiable securities and in the event of a default of payment, maintain a suit against the State in this Court, under the Constitution? The question is prolific of consequences and also of controversies if the answer be affirmative? This was foreseen in the season of war and trouble, when the confederation was formed. Compacts without the consent of Congress, were prohibited in the articles of confederation. In the various draughts of the Constitution before the Convention, the word compact was retained. In a plan of a Constitution drawn by Hamilton, *Contracts and Compacts* were prohibited. The word *agreement* is the word employed in the Constitution. What the prohibition includes was discussed in Holmes vs. Jennison, 14 P., 540.

The three Senior Justices, Story, McLean, Wayne, concurred in the opinion of the Chief Justice, and Justice Catron assented to the constitutional doctrine of the opinion. Without asserting that the case is a precedent, I may fairly refer to the discussion as weighty and impressive. The Chief Justice says: "In expounding the Constitution of the United States, every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added." The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition.

The Chief Justice, after a pertinent discussion which we omit, proceeds to say: "When therefore the second clause declares that no State shall enter into any agreement or compact with a foreign power without the assent of Congress, the words agreement and compact cannot be construed as synonymous with one another, and still less can either of them be held to mean the same thing with the word treaty in the preceding clause, in which the States are positively and unconditionally forbidden to enter and which the consent of Congress could not authorize."

This opinion defines what a treaty is, and what a compact is; and then it proceeds: "after reading these extracts we can be at no loss to comprehend the intention of the framers of the

Constitution in using all of these words: treaty, compact, agreement. The word 'agreement' does not necessarily import any direct or express stipulation. Nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both parties are acting, it is an agreement; and the use of all these terms, treaty, agreement, compact, show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention unless we give to the word agreement its most extended signification; and to apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."

The cases of New Hampshire and New York rest upon the same foundation. Those States have acquired by assignment from citizens of the respective States written evidences of debt which were put forth by Louisiana. After the maturity and the nonpayment of the debts, the invitations of those States have been accepted by creditors of the debtor State upon an agreement that they shall transfer their title for suit here. They claim to be exclusively the owners of the debt, and they appear by their law officer. Payment must be made by the debtor to the creditor; accord and satisfaction legal between other parties, can only take place by an agreement. Legal obligation on the one hand implies legal duty on the other, and these compel agreements, or may be compacts.

The plan of the Constitution was to secure union and tranquillity, by excluding occasions through which controversies might be engendered. Before the Constitution had been adopted and during the discussion upon it, the apprehension of controversies among the States, was the most conspicious condition of the public mind. A vigorous and efficient government to preserve the public order and to command obedience,

was desired to prevent estrangements and to quiet discussions. Ellsworth in the convention of Connecticut, alludes in strong terms to the necessity of union to preserve her from New York, and even Rhode Island; Maryland and Virginia, were in the same state of alienation. New Jersey was in despair from the superiority of her two neighbors, New York and Pennsylvania. The prohibitions in the Constitution illustrate the power of apprehensions. The sources of discord and contentions among States have been treaties, alliances, confederations, compacts, agreements, commercial competitions, standing armies, ships of war and war establishments. The first three and the last three were peremptorily forbidden. There were objections to the other even with a consent of Congress, so that there should be no sort of entanglements. Suppose that the word "agreement" be allowed the full meaning which has been assigned to it in the opinion cited, and that agreements of every description, written or verbal, or implied or expressed, between States without the consent of Congress be reprobated by the Constitution, it is difficult to understand how a State can have a direct relation as a creditor of another State by the measures adopted by New Hampshire and New York, for that purpose. The word agreement in the law language of Great Britain and the United States, corresponds with the word convention of the Roman laws.

It is the expression of assent of two or more to some juridical or legal relation. When A. sends into the market his note or bill payable to bearer, and B. purchases that note or bill he thereby has an agreement with A. It is besides a contract between them. The object of the prohibition apparently is that every State of the Union should understand, that there must be no relation by any mutual assent with foreign States; or with the States of the Union, without the consent of Congress; that the Constitution, treaties made under it, and the laws pursuant, were to be the only connecting links, the reason of all connections of affiliations between a State of the Union, and other States, foreign or confederate.

Anson on Cont., pp. 2, 3.

The bills filed by New Hampshire and New York, are harbingers of what may be expected from them, or from other States hereafter if they be successful. They ask the Court to set in judgment over Constitution and laws, and to annul them; they ask for a change of administration in the management of the Treasury, and that accounts be rendered in this Court for New York creditors, wherever they may be found to receive payments here. They say no assignment is required at all to New York, to authorize this suit. She has a sovereign right to appear in behalf of any one of her citizens.

Even in the matter of ceremonial, and upon questions of precedence and of etiquette, serious wars have been declared and friendly relations disturbed. Were there no prohibition of treaties, confederations, alliances, agreements, compacts, every State would have her ministers and every capital of a State would have its republican Court, with its intrigues and plots. The extent of the wisdom of these prohibitions is evinced in considering the aspects of the cases before the Court. Is there no menace to the tranquillity of the Union by an array of States here? They may be powerful, aggressive, and claiming to be empire States, deriving control of obligations of other States which are embarrassed or impoverished, perhaps, to invest surplus capital, or to make a sinking fund, as the Attorney General suggested yesterday, or perhaps to dominate the State into alliance or confederation, being her creditor.

Suppose some calamity to befall the debtor State, like war, pestilence, inundations, social revolutions, anarchy, misgovernment, to produce financial disorder. The creditor comes as an empire—with influence, power, clamorous demand, insulting reproach. The provisions of the Constitution have preordained the remedy for the mischief to follow such a condition. The Courts are not open to hear the clamorous demand, nor the insulting reproach. No armies, nor ships of war, nor domestic nor foreign alliances, nor invasions, are allowable to the imperial State to disturb the public peace or to reduce to ruin a rival or inimical community.

We are told with authority that the borrower is the servant of the lender; that the nation which lends and does not borrow is blessed, and the nation that borrows and does not lend is under a curse. There is uncertainty, disorder, perplexity, and cause for apprehension and anxiety in the condition of a State where there is an exorbitant debt. These are all aggravated when the public debt is principally in the hands of foreigners; and this is augmented when the creditor is powerful and aggressive, and the quarrel to ensue internecine. The Constitution does not prohibit the creation of debts, but even as to these there are provisions which indirectly restrain. But it has declared in terms which cannot be misunderstood that between the States there shall be agreements of no kind without the consent of Congress, and to individuals that the Courts of the United States are closed to all individuals who would enforce contracts against States.

III.

The answers of the defendants deny the jurisdiction of the Court of Chancery to entertain suits upon a purely money demand, such as is set out in the bills of the plaintiffs, and nothing is shown to avoid this objection to the bills of the plaintiffs.

Revised Statutes of U. S., 723.

IV.

There are two other cases submitted to this Court which have an object analogous to the cases of New Hampshire and of New York. They come to this Court from decrees or judgments pronounced in the Circuit Court of the United States in New Orleans. The case of the State of Louisiana, on the relation of Elliott, Gwynn & Walker, was commenced in a State District Court to obtain a mandamus against the auditor and treasurer of the State, (Jumel & Burke,) to direct the payment of coupon

warrants owned by these relators, out of moneys in the treasury of the State, raised by taxation under the enactments of the State Legislature in 1874, and which enactments were ratified by a constitutional amendment. No action upon the petition was taken in the State Court, but the case was removed to the Circuit Court under the acts of Congress providing for the removal of suits between citizens of different States. After the removal the defendants appeared and answered, and the facts being ascertained the Court dismissed the petition for a mandamus. A case of the same character and facts as this was commenced by another party in the same District Court of that State, and was decided in that Court, and the judgment therein was carried by appeal to the Supreme Court of the State of Louisiana, and is reported as Hart vs. Burke, Treasurer, 33 Ann, pp. 500. This case was argued in the Supreme Court of Louisiana, and decided, and was again examined on a petition for a rehearing.

The decision was by an undivided Court. The decision of the Court was: "No constitution nor law of this State has ever clothed the District Court or the Supreme Court with authority to support a suit against the State, and to award judgment for the payment of the same, or to force her to make indemnity for breach of her obligations without her consent, formally expressed, which is found to be wholly wanting in the present case, in which her adverse will manifestly appears." The Circuit Court of the United States cannot acquire a jurisdiction to issue a writ of mandamus in a case like this by any thing which is contained in the Codes of the State of Louisiana, regulating procedure in the Courts of that State. There is an absolute abnegation of all authority on the part of the judiciary of the State to comply with the application of the relators in this suit, and a clear decision that the judicial power of the State does not extend so far. Nor can we admit that if the State had invested their Courts with such authority to decide questions of administration affecting the disposition of money in the treasury of the

State, and of which officers of the State were the custodians as her simple agents and mandataries, that they would in any manner enlarge the jurisdiction of the Courts of the United States, so that the Courts of the United States shall control and govern her official agents of administration in the performance of their official duty in the collection and distribution of the revenue of the State, in an important branch of expenditure purely of State concernment. These questions of administrative character in relation to the domestic affairs of the State are as exclusively under control of the State as similar questions in the government of the United States are under the control of the United States.

These exclusive questions are determined by the subject matter. Each government is organized with separate, distinct and co-ordinate departments. In Louisiana one department may not encroach upon the functions of another, and so in the United States.

This Court has on a number of occasions recused themselves from deciding causes and questions because the decision belonged to another department, and in other cases declined to interfere with adminstrative action as not within the scope of the judicial power. Other questions have arisen and decided upon no other ground than that the Congressional authority was conferred to dispose of such questions and that they could not be reduced to the compass of a case at law or in equity. The decision upon the Bank of United States, the constitutionality of legal tender laws and reconstruction laws are of this class. De Tocqueville in his work upon the reign of Louis XV, describes the Parlement of Paris, that had a normal and admitted jurisdiction to try cases but which had involved itself with determination of questions of a political character. He remarks: "here was a great anomaly, the consequences of which were not slow to make themselves felt. The pretensions it gave rise to became the source of a perpetual conflict between two powers, the judicial and political, the limits of which have never been clearly defined; and led in the course

of time to the destruction of the magistracy and royalty." Administration implies the habitual and vital action of government in the execution of the laws for the preservation of order. It is all of government apart from the enactment of laws, and the rendition of judgments in Courts. It has the care of public domain for preservation or distribution. The revenue of a State depends upon the Legislature. The representatives of the people order the collection or they refuse the collection of revenue. The popular branch alone can originate a revenue bill. Their responsibility is to the people. The power to raise, to collect, and to appropriate the revenue belongs to the Legislature.

The judiciary has no voice in the matter. The facts ascertained in the Circuit Court are, that certain moneys are within the Treasury which were collected as taxes; under the laws of the State these moneys could not be elsewhere. They belong to the State. The defendants, (Burke & Jumel,) say they are not charged with this money to pay the debt of the plaintiffs; the money is there for other purposes; that no authority has been confided to them to examine the coupons the plaintiffs have for any purpose whatsoever; nor the bonds but for a single purpose. In the condition that the bonds are in, they say they do not represent a claim on anything in their keeping. All powers are terminated that were ever confided to do more than *one act*, and that has no relation to the coupons. They have, they say, no control contrary to the law of the Constitution of 1879.

The demand of the Syndicate is that, independently of the Constitution of the State, and of the laws and of the disclaimers, this Court must send an order to these two persons to audit the claims, and to draw the warrant on the Treasury of the State, for the payment of these coupons, whether the State Constitution, or laws, are willing or not. The debt has not been judicially ascertained. How can a debt be ascertained by a Court without the presence of the debtor? The primary evidence consists in a promise of the State, and the State does not recognize the evidence of the promise, and has declined to pay the demand. The

case is one that the Court has no capacity to deal with, unless the Court shall say that the powers of the Court are adequate to convict a State without any process of law, and for the precise reason that the Constitution, having prohibited a suit against a State, and that no process of law might be issued, therefore judgments may be rendered to enforce her contracts, or what are represented to be her contracts, without suit or process of law at all.

V.

The fourth of these cases is a chancery suit commenced by the same plaintiffs against the same officers of the State, upon the same matters of fact as are alleged in the case above mentioned. The findings of the Court are like those in the other case. The petition for a mandamus in the former case corresponds to the bill filed in this case. The prayer for a mandamus is the correspondent of the prayer for an injunction in the last. The former case came subsequently to the second. The former asks for payment, the latter was to keep the money in hand.

In neither one of these cases was the prayer granted. Nor was the State a party in either of them. The proposition in both is that, although the State cannot be sued *in personam* on her bonds and condemned by the judgment of the Court to pay, that she can be sued *in rem*. The money in her treasury is affected by legislative act, not by pledge nor hypothecation, but by the promise or contract of the State to raise money, and to use it for the payment of the coupons as they are presented, and that this contract to do this creates a right in the money itself, and that chancery can enforce this right, although the State cannot be sued in the Courts of the United States.

It cannot be pretended that any right of property has been conveyed by the various enactments. The enactments are all executory in their operation, and make no impression on the subject of the taxes. The persons to pay and the manner of payment, and time of payment into the treasury, are undefined.

The bonds remain in the hands of holders who may call for payment or may retain the bonds in their hands. When presented and paid, the holder does not inquire of the fund. The holders of these bonds would have acquired a right of action for the breach of a term of the contract, had the obligor been amenable to a suit. The action in every case of the kind must have been commenced against the debtor. A right of action is engendered by the contract itself, at its date, and this right inheres until it has been satisfied. This right of action becomes a vested, operative, efficient remedy upon the breach of the contract.

The embarrassments the Syndicate suffer in the prosecution of their suits arise from their stubborn resistance to the constitutional fact, that no right of action against a State, within the Courts of the United States, is acknowledged as engendered by or as inherent in any contract made by a State of the Union with any State, without consent of Congress or any individual whomsoever. Nor can such contract become actionable upon any term of it against the State, in those Courts.

A State of the Union has all the faculties of a civil corporation to acquire property and to form contracts. She has besides an immunity from suits in all the Courts of the United States, commenced by individuals. These are recognized in the Courts of the United States. When their judicial power comes in contact with the property of a State, in her own possession and subject to her dominion, or with contracts made by her, and where enforcement is sought for against her, that power is stayed. That judicial power, upon the ascertainment of the conditions, recedes without further inquiry or action, in obedience to the Constitution, which has marked and defined bounds it must not pass.

VI.

The relation of the State of Louisiana to the subject of this controversy, and to the judicial proceedings against the State and her officers, we have undertaken to define in Article III of our brief:

III.

The conventions or agreements of one of the States of the Union with individuals create no juridical relation between the parties; nor create a juridical obligation. The immunity of the State from suit or claim in the Courts of the United States, in her own Courts, or elsewhere, leaves her conventions or agreements without other than moral sanctions. They belong to the class of conventions or pacts "*quæ non habent causam civilem*," and are distinguished from contracts which create legal rights that may be enforced by suit in tribunals established by the State. In the Federalist it is said "There was no color to pretend that the States had renounced this immunity from suit, nor be divested of the power to pay their debts, in their own way, free from any constraints but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign and have no pretensions to a compulsive force. They convey no right of action independent of the sovereign will.

Federalist No. 81, p. 382, Ed. 1818.

The author of this number, (Hamilton,) in his report upon the public credit, discriminates this characteristic of public debts. "Public debt," he says, "can scarcely be defined either property in possession or in action. It is evidently not the former till it is reduced to possession by payment. To be the second would suppose a legal power to compel payment by suit. Does such power exist? The true definition of public debt is a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

Hamilton's Rep. Annals of Cong., 1795, pp. 13, 62.

Mr. Webster in a professional opinion given to Barings & Co. in 1839, relative to State obligations, develops the same senti-

timent, and declares this immunity of the States from any compulsory force. He says, "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments; the same basis for example as loans made by the United States under the authority of Congress; that is to say the good faith of the government making the loan and its ability to fulfil the engagement * * *". He says, "It has been said that the States cannot be sued on these bonds. But neither could the United States be sued, nor I suppose the crown of England in a a like case. Nor would the power of suing give to creditors, probably, any substantial additional security. The solemn obligation of a government arising on its own acknowledgment would not be enhanced by a judgment rendered on such bond."

VI Webster's Works, 537; I Calhoun's Works, 260–263.

Justice Blackburn incidentally says, "That foreign and colonial governments frequently create a public debt, the title to portions of which is made to depend on the possession of bonds expressed to be transferable to the bearer or holder; there can hardly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government."

Crouch vs. Cred. Fon., L. R., 8 Q. B., 384.

The French jurists recognize the difference between such securities and the ordinary commercial and mercantile obligations and credits which circulate on the Bourse. They say, "In effect that which gives to an obligation its character as an act of commerce is not its transferable quality by endorsement, or manual delivery, or the usage in regard to it in the course of trade. It is the nature, the cause, the origin of the act itself. It is impossible to maintain that the State performs an act of commerce, so that she is a merchant. The State does not borrow in order to trade, or to buy and sell again. Her act is of political or administrative import. The fact that the securi-

ties are sold in the market, or are quoted in the reports of the exchange does not alter the nature of the obligation nor the quality nor character of the debtor. These are independent of the obligation."

42 Dalloz, Jurisp. Gen. Tresor public, No. 1105.

A similar opinion is expressed by this Court in a suit relative to a bill of exchange drawn by the United States upon a foreign government. Such a draft was not a subject for the law merchant. Every security put forth by a State is dependent upon the action of the legislature for payment. A law is necessary for the withdrawal of the public money from the public treasury. Every bill of exchange drawn by it must be drawn on a fund and no officer can bind the State unless by the sanction of a law. No suit can be brought to enforce the making of an appropriation, nor to compel the payment of the money.

Bank of U. S. vs. United States, 5 How., 382.

2 H., appendix, 745, 760; Reeside vs. Knox, 2 Whart., 233.

The clause in the Constitution of the United States which prohibits a State from passing a law to impair the obligation of contracts can have no application to the securities thus issued or circulated. These securities have no juridical quality. They cannot be enforced by judicial means. They create for the holder no legal right which may be asserted in a legal tribunal.

It may be admitted that the duty to make payment according to the tenor of the bond is a moral duty and binding upon the conscience of the State. What we affirm, is that the Constitution of the United States contains no provision to constrain the performance of the duty by any legal or political sanction.

This Court may, when a case is presented, refuse to acknowledge the validity of a law of a State which impairs the obligation of a contract. But there is no power to enforce against a State obligations for the payment of money which the State has executed.

The clause in the Constitution which prohibits a State to pass a law impairing the obligation of contracts, was introduced at a very late stage of the proceedings of the Convention. Mr. King, of Massachusetts, proposed to incorporate a clause that had been adopted 13th July, 1787, by Congress as a part of the ordinance for the government of the North-west territory. The clause is: In the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force that shall in any manner whatever interfere with or affect private contracts or engagements, *bona fide*, without fraud previously made. The principle of this clause is, to protect contracts from retroactive and injurious legislation. It recognizes contracts as vesting rights of property that ought to be protected from interfering legislation. The idea was adopted in the Session of the Convention of the 28th August, and came back from the Committee of Style, who arranged the Constitution, and made a report the 11th September, nearly in the form in which it exists in the Constitution.

The purpose of the clause is indisputable. Its import remains to be considered.

The word contract has acquired prominence in the law language of Great Britain and of this country, as a generic term within this century. The word is not found in our English Bible, though in that Book relations analogous to contracts are much spoken of. The word covenant, in its connection with and corresponding to the Latin *conventio* is the favorite, though agreement and promise are occasionally found. Lord Coke, speaking of a demise of land, says, there is an implied contract of the lessor that he is seized for in every contract, there must be a *quid pro quo* for *contractus est quasi actus contra actum*, and if the lessor hath nothing in the land, the lessee hath not *quid pro quo*. In the *Termes de ley*, *verbo*, contract, the word is defined as a bargain or a covenant between persons, where one thing is given for another, which is called a *quid pro quo*. If I sell my horse for money it is a good contract, but if a man make a

promise to me, that I shall have, and he will become a debtor therefor, I shall never have a case to recover him, because the promise was no contract. Chitty, in his work on contracts, has a definition, but he says the word is applied usually to unsealed agreements. The classification of debts, some time after Blackstone, was of debts of record, specialties, and simple or parol contracts.

Chitty on Cont., 1, 2. Co. Litt., 47, b.
Becket vs. Bradley, 7 M. & G., 998.
Wiseman's Case, Co. II, p. 15.
Reniger vs. Fowgoss, 1 Plowd., p. 17.

One would hardly suppose that the public securities of a State in 1787 were classed as contracts. The first sentence in a recent work on the principles of contracts is, "It is somewhat curious that no such thing as a satisfactory definition of contract is to be found in any of our books." Pollock, Prin., p. 1. There was hardly a publication upon the subject before Powell in 1790. Pollock and Anson concur that a contract is an agreement by two or more persons, in a common intention in relation to some matter of a juridical nature. They concur that agreement is more comprehensive than contracts, and that the difference is that a contract is an agreement enforcible at law between two or more persons, by which rights are acquired or duties imposed. A contract is an agreement that raises an obligation, and a careful examination will show that it was employed in this sense by Lord Coke, in the other work I have cited.

Anson on Cont., sec. 9.
Pollock on Cont., p. 6.

"In the largest signification which can be given to it correctly," says Austin, "it denotes a convention or agreement which the Courts will enforce, that is, it bears the meaning originally attached to it by the Roman jurisconsults. In the Roman law, convention is a synonyme with the word agreement, and it comprises contract and something more.

Austin on Jurisp., 1016, 1017.

The Constitution ordains, that no State shall pass a law impairing the obligation of contracts. Contracts, the subject of protection are those agreements which would have been enforceable at law, in case there had been no impairing law to intervene as a hindrance. The Constitution does not enjoin a State to furnish ways or means by which contracts shall be enforced, nor that they shall be effectively enforced. These are left to the State to provide at her discretion and opinion of duty. The Constitution does not undertake to organize the State government, nor to distribute her judicial power, nor secure a competent administration of that power in the State. The Constitution provides, in respect of bankruptcies, a control over contracts and for their enforcement, but, only incidentally and between certain parties, does it go beyond this? The Constitution was framed to form a union among States which had been organized, where contracts already existed and laws for enforcement had been carefully enacted. The apprehension existed that from the fluctuations of trade, and the spirit of speculation or from extravagance or internal disorder, a time might come when the sober expectations of industry and the obligations of contracts would be disregarded, and that there would be interfering legislation with existing contracts, whereby the rights of one class would be diminished for the convenience or profit of another.

The contract to be protected is an agreement upon the subject of some legal relation, and it imposes a legal obligation enforceable in a Court of justice. Such a conventional obligation cannot be impaired by any law subsequently made. Under the Constitution such contracts confer rights, which are property, and of which a party cannot be deprived by arbitrary legislation.

The effect of contracts is to create obligations, and obligation and right are inseparable and correlative ideas, and are found in all contractual obligations. The rights and obligation are legal, and do not refer to any that are not already under the

safeguard of law. Agreements which have their origin or sanction in principles or motives of morality, equity, propriety, charity, comity or amenity, are not included within the compass of this Constitution.

The duties that men owe to themselves, or to their families, or to their neighbors, or to humanity at large, give rise to obligations, but unless there be a valid legal contract, under all the conditions prescribed by the law for such a relation, it does not enforce them, nor does the Constitution protect them. These are imperfect obligations, the characteristic feature of which is that they do not confer a right of action.

The Constitution was made through the agency of the States which compose the Union. These States had laws and a magistracy, and fully understood that the binding and efficient force of a contract was to be found in their laws and their magistracy.

The authors of the Constitution understood that a contract obtained its obligatory strength from the public authority which was pledged to afford justice without denial or delay, and that an impairing law could only operate to diminish or to restrain the employment of that strength. Hence the Constitution makes no address to the parties to a contract, and reads no moral lesson such as found in the ordinance of 1787. The Constitution finding in the section of that ordinance which had been brought to their attention an existing evil, and the remedy, embodied it in the expressive clause we have quoted. The evil was legislative interference with the engagements of men whereby rights were impaired. The prohibition is that no law shall be passed whereby this shall be done in the future. The object was to maintain in favor of the parties to the contract the relations of the State in the same condition as when the contract was made.

There must be no interfering legislation. The obligation of the contract must not be impaired. The Civil Code of Louisiana has borrowed from the continental codes of Europe an article

at once accurate and forcible. Agreements legally entered into have the effect of laws on those who have formed them. C. C., 1901. This is the import of the Constitution of the United States. Parties who are capable, and freely consenting and acting according to the laws, in view of the civil and social necessity for intercourse, traffic, commerce and interchanges of property, may make contracts, and these shall have the effect of laws between those parties without interference or diminution on the part of a State. The denial of the aid of the State by a subsequent law or alteration in the time or manner of performance, or in the withdrawal of existing remedies, conflicts with this Constitution. We have cited cases in the briefs and the works of commentators to determine the meaning of the word obligation. Two meritorious works by English authors may be quoted. Anson defines the obligation of a contract to be a right which arises out of every contract validly made. There is a corresponding duty to respect that right and to perform the duty. Upon a failure to perform, a *vinculum juris* arises and binds the parties, which is only loosened by payment. Pollock says where there is a perfect obligation there is a right coupled with a remedy, that is, appropriate process by which the authority of a competent Court can be set in motion to enforce the right.

Anson on Cont., p. 7; Pollock prin. Conts., 568.

This Court for the last decade has been instructing large communities in the United States, practically, the signification of a *vinculum juris*. The Court will appreciate the description of a Belgian civilian of great learning and of much repute.

He says: an obligation is a lien; the Latin expression is more energetic—a chain. He who is enchained cannot escape the power of him who holds him in fetters. He to whom he is obliged can carry him before the tribunals and compel him to surrender whatever he withholds. He cannot be delivered from this chain until he has performed his contract. I hasten to say

this is all figurative—It is the lien of the law which binds the debtor. But this lien may be likened to corporal fetters, for whoever constrains his debtor, diminishes the debtor's liberty. So long as he is obliged he is not free; he abdicates his liberty.

15 Laurent, No. 424, p. 477.

Pursuing the same inquiry, we find obligations are divided into classes—civil and natural. A civil obligation is the only one which codes deal with. The civil obligation is that one which gives to the creditor a right to pursue his debtor before the tribunals, to compel him to fulfil his engagements by process of execution against his property, or his person in some cases. The natural or imperfect obligation does not create a lien of law, but only an equitable claim. It does not confer upon the creditor a mode to coerce the debtor to liberate himself.

This class of obligations are those which appeal to the reason and the conscience, and have no sanction in the form of an action, and so they are not referred to in the Code.

1 Picot, Code Civ., pp. 662–3.

Larombiere does not differ from the authors cited, as to the nature of the contract nor the quality of the obligation: "A contract divested of the faculty of maintaining an action, is without a legal existence. It is as if it were inexistant. So long as the right of action exists, the debtor cannot with impunity withdraw himself from the fulfilment of his obligation. The action is exactly framed to overcome resistance, and to compel him to fulfil his engagement through the modes of execution which are the consummation and end."

Larombiere des obligations, pp. 360–364, Secs. 1, 2, 3–6, 7.

The decisions of the Court upon the application of this clause in the Constitution to the charters of private corporations, indiscriminately, have had the effect to add an additional clause in

the various State Constitutions to the end that such laws are made revocable as other laws, and do not imply a contract of a perpetual obligation.

In Sturges vs. Crowninshield, 4 Wh., 208, Chief Justice Marshall defined the obligation of a contract to be the law that binds the debtor to perform his undertaking, and that any law that releases him from this obligation impairs it.

In Dartmouth College vs. Woodward, 4 Wh., 518, the Chief Justice stated the arguments and the history of the constitutional clause, and the motives being an interference with the contracts of individuals, and inquires as to the signification of this clause.

He answers: "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and that the Constitution is not to be so construed may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a Court of Justice." This statement leaves us at liberty to consider whether the contracts disclosed in the various suits before the Court upon this argument, be such as can properly be maintained in a Court of Justice. Before dealing with that inquiry, I will examine the case of Ogden vs. Saunders, 12 Wh., 332.

The important question decided by the Court was, the validity of certain laws of New York which discharged a debtor, whose debt was contracted in New York where he resided, and whose debt originated after the laws had been adopted by the State. Chief Justice Marshall denies the power of that State to pass any law, the effect of which was to discharge a debtor for insolvency or other cause, and that whether the debt was contracted before or after the enactment of the law, was immaterial. The Constitution had employed terms of prohibition, which comprehended contracts and obligations of contracts without an exception, and no exception could be made.

The Chief Justice was not sustained in this conclusion by the Court. His opinion is cited to ascertain the comprehension of the clause. He defines the contract as an agreement which binds to the extent of the stipulation. The case before him was to enforce an acceptance of a bill of exchange. "All admit that the Constitution refers to and preserves the legal obligation of the contract. Obligations purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed upon States by the Constitution are intended for those objects which would, if not restrained, be the subject of legislation." Justice Washington delivered an opinion in this case upon the same question: "I ask," he says, "what is it which constitutes the obligation of a contract? The answer is given by the Chief Justice in the case of Sturges vs. Crowninshield, to which I readily assent now as then: It is the law which binds the parties to perform the contract. It cannot for a moment be conceded that the mere moral law is intended, since the obligation which that law imposes is altogether of the imperfect kind, which the parties to it are free to obey or not, as they please."

We are thus brought a second time in face of an important inquiry, as to what is meant by imperfect obligations? Larombiere, who has been cited in the brief filed, furnishes a description. He says, "the duties of man in society are distinguished into two kinds, having a reference to the positive sanctions derived from civil laws. Some of these are duties of justice, others, duties of morality. The first are those to which the law accords a sanction, and the fulfilment of which can be compelled by means of constraint, and action under the guarantee of society. They constitute obligations properly so called, and they import a juridical lien. They engender a real right in favor of the person for whom they have been created. Duties of morality have no positive sanction. They exist without conferring an essential right. Hence, as the civil law only recognizes obligations,

the moral law merely recognizes, and can only recognize duties. If the positive law has the same point of departure as the ethical or philosophic law, it does not have the same extension, and as it has been said that the law has the same centre as morality, but has not the same circumference."

3 Larombiere des ob., pp. 58–59.

1 Bentham's Works, p. 148, sec. 8.

Larombiere says: That when an obligation is produced with the imposing characteristic of a legal necessity for its fulfilment, we denominate it a perfect obligation in contradistinction to obligations denominated imperfect, because their execution cannot be coerced by a lien of law, but only by a lien of morality honor, natural equity.

1 Larombiere, p. 5.

The imperfect obligations and their precise significance have attracted scarcely any attention from English or American authors. They embrace those arising from the incapacity of parties; contracts defective for want of compliance with legal formalities. Where contracts become inoperative because of some law, and there has been no performance or payment. Where there are no Courts competent to enforce them. Where the judicial power does not extend to their enforcement.

Pollock prin., 568–600. Cases cited in the briefs.

33 Dalloz, Jurisp. Gen., pp 65–66. Ibid, p. 246.

It has not been contended that any enlargement of the jurisdiction of the Courts of the United States has arisen out of the prohibition in the Constitution in respect to the States, so as to coerce them into an observance of contracts. Nor could anything in the Constitution diminish the force of the declaration in the eleventh amendment. The command of that amendment is absolute. Every holder of a security for the payment of money, whether issued by the Federal or the State Government,

cannot misunderstand his position. No judicial power exists to enforce the performance.

In the cases of New Hampshire and of New York, there is an objection to their suits, which arises out of the indisposition to enforce claims of parties which are not frankly and truly represented. The plea of the defendants is, that the enactments made by New Hampshire and New York, have invited the making of simulated transfers of right, without reality, and were designed to evade the spirit and the letter of the Constitution of the United States, and there is no controversy between the parties to these suits. Courts of Chancery discourage suits that are artificially produced, and do not arise out of the relations between the parties. The merchandise consisting merely of a faculty to come into a Court and to ventilate opinions and display passion is not allowed. The barrator, the huckster of litigious rights, the appointment of brokers charged with conducting suits for parties unknown to the Court meet with no hospitality. The objection we make appears at a remote period in history. Exodus, ch. 23, 1, 2, 3. A chapter of the Roman Pandects contains an edict and the constitutions of a line of Emperors under the expressive title: *De alienatione, judicii mutandi causa, facta.*

The pro-consul was directed to adopt every mode, so that one of the parties to a cause should not suffer by the act of the other. This might be done by a change of parties, and it is provided that the alienation, in bad faith of the subject of contestation, so as to make another party (*adversarium suo loco substituerit,*) should be the subject to a suit for damages, &c.

3 Poth. Pand., 412.

If actions have been transferred to persons more powerful than the owners, these shall be furnished by a loss of the demand. *Aperta enim credentium videtur esse voracitas, qui alias actionum suarum redimunt exactores.*

The Emperors, to protect debtors from an adversary too powerful, (*suscitandi potentioris adversarii causa,*) prohibits the assignment to the republic (*reipublicæ vel fisco*) in payment of his debt, the actions he may have against them.

It is unworthy of our dominion (*abhorret a sæculo nostro*) that the Fisc should receive an assignment to pursue the debtors of an individual, in payment of our demand against him.

It is *contra juris rationem* you should obtain the assistance of the State (*reipublicæ*) to uphold your claims against your debtors, under a pretext to pay your debts to the State (*reipublicæ.*) Another Constitution is an answer to one who proposed to give half of his effects to the Fisc, for the collection of the other. The answer was, that it was contrary to the principles of the Government to accept such donations, and admonished him. *Unde jus tuum, si quod tibi competit, citra invidiam fisci mei tueri solemniter cura.*

3 Pothier, Pandectes de Justinian, p. 422–426.

The tone and sentiment expressed by these citations are honorably reproduced and embodied in the message of his Excellency L. B. Robinson;—and the resolution of the General Court of the Commonwealth of Massachusetts, which we have submitted to the Court. The rule of chancery is to refuse recognition or aid to a party who comes to the Court as a volunteer. The Court has no friendliness to him who comes with declarations of irremediable injuries that he has sought to obtain that he might have the luxury of grief. Nor has it compassion for him who has ferreted after his trouble. When he has bought his grievance the Court is inquisitive and suspicious. But when he has nothing in the suit but his name and capacity to appear in suit, he is expelled with contumely. His pretensions will not be enforced.

Anson on Cont., 178.
Pollock on Cont., 299.
Story's Eq., Sec. 1040.
Poe vs. Davis, 29 Ala., 676.

The record shows that New Hampshire and New York have allowed the use of their names to the owners of the coupons to maintain these suits, for no other cause than that these cannot bring a suit here or elsewhere in the Courts of the United States. They assume, that the denial of judicial power to the United States was made upon some superficial and cursory view, or some irrational popular impulse that ought not to be respected at this day, and that States and citizens and the Court may without any self-condemnation connive at and participate in any piously plausible form of evasion. It is only necessary to preserve the pious appearances. This has been done by lending the name of the State and the service of an Attorney-General.

VII.

The Syndicate of brokers who have collected bonds for suit in their own names, found that a suit against the State could not be directly made, have attempted to reach their end by an expedient of another sort. The officers of the State charged to take the care of the public money have been brought into Court as casual and temporary bailees, and these are made to serve the office in the suit that Richard Roe was formerly employed to perform in suits of ejectment. In these suits of the Syndicate the State is charged as the debtor. The evidence relied on contains a promise made by the State. The sums of money which the bills would appropriate come into the treasury from the officers of the State who collect taxes, and the depository is the Treasury of the State, and the custodian, the Treasurer of the State. The State is not a party. The Constitution of the United States has taken care by a direct command to make it known that the judicial power of the United States does not extend to a suit against such a party. It is the only instance of such a command in reference to the judicial power. The State cannot be a party. Therefore, say the Syndicate, we

will appoint substitutes. The rule of chancery is, that the immediate parties to a contract or their successors are necessary parties to the suit for its enforcement. Other parties may be proper or allowable, and may, perhaps, become necessary sometimes, and under some circumstances, but the principals are necessary. In this case the State is the only party indebted or charged to be indebted. The object of the bill is to establish a debt against her and none other, to be paid out of money belonging to her and none other.

Shields vs. Barrow, 17 H., 130; 19 H., 113.
Pomeroy on Contracts, pp. 546, 484–5, 491.
Revised Statutes of United States, 737.

The Revised Statutes of the United States allow suits to proceed sometimes when all necessary parties cannot be made; but the absent parties are not concluded or bound.

The purpose avowed in this case, is to substitute the officers for the State, and to conclude the State as sufficiently represented. The suit is acknowledged to be a suit to bind the State *in personam*, and by the appropriation of money that the State possesses. The case of Osborn vs. Bank of United States, 9 Wh., 738, is cited, and I was startled to hear the Attorney-General of New York affirm to the Court, that this Court had sent a mandamus to the Treasury of Ohio and taken money from it. I never heard of this before—I may say every proposition stated in the opinion delivered in that case was carefully and calmly examined, and the decree rendered in the case embodies the exact conclusion attained by the Court and the limit of judicial action. The case as presented was, that the Bank of the United States maintained two branches of the bank in Ohio. These became obnoxious, and the Legislature imposed exorbitant taxes upon them to expel them from the State, and the auditor was empowered to appoint agents to make *seizures* of bank property, and to dispose of it if there was a default of payment. Before the taxes were payable, the bank procured

an injunction against the auditor and his agent, and served a copy of the order. Notwithstanding the seizure was made of specific sums of money consisting of specie and bills, and while these were in possession of the officers, a writ of injunction was served, commanding the officers not to dispose of the money, but to hold it subject to the order of the Court. Thus the Court had jurisdiction of the officers who seized and had possession of the money. This Court, to the objection by the defendants that they had no interest in the subject of the suit, and were merely agents performing duties as subordinates without claim of any kind of their own, and that Ohio was the only party to respond, made for answer; there was weight, and there was difficulty in the objections, and that the difficult question to be decided was, whether the Court *may act upon the agents employed by the State and the money in their possession.*

The Court decides, after a careful inquiry, that the State of Ohio was not made a party to the suit, and that the eleventh amendment of the Constitution had not been transgressed by any action in the Circuit Court.

This question being settled, this Court states the true question in the cause. THE TRUE QUESTION IS NOT ONE OF JURISDICTION, BUT WHETHER, IN THE EXERCISE OF JURISDICTION, THE COURT OUGHT TO MAKE A DECREE AGAINST THESE DEFENDANTS? WHETHER THEY ARE TO BE CONSIDERED AS HAVING A REAL INTEREST OR AS BEING NOMINAL PARTIES?

The Court had decided before this suit that the Bank of the United States had a constitutional and a legal existence—that she enjoyed exemption from taxation, such as Ohio had imposed, and the laws of that State were thus inoperative. So the seizure was a trespass, and without any valid plea of justification. The title to specie and bills seized was not changed, and the bank might have resisted the seizure, and might have made a recaption without offence or might hold the seizors in trespass, trover or detinue.

But, the State of Ohio being powerful, and proposing to renew this every six months, and the sum being large and the danger of loss imminent, and the business of the bank endangered by such violence, a Court of Equity might, under such circumstances, arrest the moneys before they were put out of their possession in the hands of the wrongdoers, and so an injunction was allowable to restrain these agents from making any disposition or employment of the money in their hands, whereby restitution could be hindered. On the hearing these defendants were adjudged to have been trespassers. They were alike, and together or apart liable to restore the precise specie and bills they had taken. This property they had taken without lawful authority, and to return it in the same form in which it had been taken, so it should be restored to the owner, was a pure equity.

So scrupulous was this Court in the decree, that the decree of the Circuit Court was reversed, in so far as interest was allowed from the date of the seizure. The Court held that by the injunction the defendants were mere depositaries, and without power to employ, and thus interest could not be charged. Analagous cases to this are of frequent occurrence. A sheriff sometimes makes a seizure with process from a Court without jurisdiction, or when the judgment was rendered without citation. A collector of customs charges duties upon merchandise on the free list, or imposes and exacts an excessive duty. A Court appoints an administrator upon erroneous information as to the death of the supposed decedent. These officers are in every case personally liable at law, without reference to the persons interested in the orders, or who had procured them. A person interested as owner in each case, when there were facts of mischief and irreparable injury, might resort to Chancery.

The decree of the Court was a simple direction to the defendants to restore the money to the bank *they* had taken from it without right. They complied, probably, to the order upon notice. Certainly there was no mandamus sent to the

treasury of Ohio. Nor is there anything in this case to warrant the conclusion that this Court is indifferent to the conditions upon which it assumes jurisdiction. The second case referred to and insisted on by the plaintiffs is Davis vs. Gray, 16 Wall. The suit was by a receiver, in charge of the property included in a railroad mortgage upon which a suit for foreclosure and sale had been commenced by a trustee against the insolvent railroad company. An important property in the mortgage, and referred to in the order making a receiver, was a land grant to the company from Texas, of sections of land on the line of the route of the road for several hundreds of miles, through an unsettled and unsurveyed country. The railroad company was to finish the railroad, and on the completion of sections could have their grants located, and patents were to issue. The company was charged to make the surveys. Only a small portion of the railroad was completed. The surveys and locations were not complete. The railroad was not finished, as had been agreed. There had been civil war and trouble. The Legislature of Texas had legislated contradictorily, now releasing forfeiture, then declaring a forfeiture, and that the lands were for entry. Some entries had been made.

The receiver filed his bill to protect the grant from the location of warrants, settlements and incumbrances, under this legislation. He claimed to have undisputed possession of all the grant—that the title was a good one; that the allowance of other claims were ruinous.

The bill of the receiver is full and forcible, as if he expected no contradiction, and was determined to present a perfect case. It was not contradicted, though some of the statements are somewhat doubtful and certainly issuable. There was a demurrer; this was overruled. There was a decree *pro confesso*, a final decree and an appeal. The better report is in 1 Woods C. C.

Davis vs. Gray, 16 Wall.

The Commissioner of the land office in Texas has control of locations of warrants, settlement rights, and of surveys and the issue of patents. The Governor signs the patents with the Commissioner. The bill charged that there were floating warrants, and other rights that might or might not be located on the lands; there was risk and consequent damage. The holders were not known, and could not be ascertained. The number was legion. This receiver desired to keep his land grant free, and obtained an injunction that these officers should not act in the matter of the location of these floating, and inchoate rights on the lands covered by his grant. The State of Texas was not involved in this controversy. She had the full legal title over all the lands. The conditions on which the patents were to issue had not been fulfiled by anyone.

The Receiver had the property in possession under orders in a pending cause, and this was confessed by the demurrer and by decree *pro confesso*, and his title as alleged was not disputed. The Governor and Commissioner only claimed that they were the State, and the State could not be sued. The claim made was for a temporary suspension of the powers of officers connected with the land office of Texas, in favor of an acknowledged right of the railroad company, and of the receiver in possession. The opinion of the Court is diffuse, and discusses a variety of subjects in connection with the cause. The opinion in an analysis of the case of Osborn vs. Bank of United States, affirms that it had been decided therein, that it being impossible to make a State a party to a suit "*that the Court of Chancery may proceed to decree against the officers of a State as if a State were a party to the record.*" The decision in that case was, that whoever was concerned in seizing the money of the bank was a tortfeasor. That the injured party had his remedy against all or each one in a Court of law. In a Court of Chancery, that the Court having the specific tortfeasor who took, and who had the money, that none other party was needful to authorize the Court to proceed.

The case of Davis vs. Gray upon the facts agreed to by the parties defending, involves no question in which the rights or interests of the State were involved. The decisions of this Court afford instances of similar interferences with the officers of the land office of the United States by the issue of injunctions to withhold action, *pendente lite.*

The Board of Liquidation vs. McCombe is cited, as justifying the Court to dispose of property and rights of a State without citation or other process of law by a free application of this dictum in respect to the decision in the case of Osborn, to the effect that a Court of Chancery may proceed to decree against the officers of a State, as if the State were a party to the record in cases when the State could not be a party. As a general principle, it would be difficult to find one more inexact and more dangerous, if it be implied that any right or interest of the State could be concluded in her absence. The Statutes, creating the Board of Liquidation, are a part of this record. They provided that the board might prepare and issue bonds to pay specified debts, upon terms of composition. Two-thirds of the entire issue had been appropriated, when the Levee Company obtained from the Legislature the liquidation of a complicated and contested account of a different character, from the classes of debt mentioned in the laws, and to be paid in the bonds held by the board. A bondholder, who had made a settlement, objected and filed the bill to restrain the payment in this issue of bonds. and impeached the claim of the Levee Company upon the State as invalid, and that the legislative settlement was contrary to the Acts of 1874, and that the composition feature of the Acts had not been applied. This Court sustained the bill as contrary to the conditions of the Act, and that the board should not use the bonds for the payment of the Levee Company.

This Court treated the bonds as issuable only by the Board of Liquidation, for the specific purpose of carrying out the settle-

ment which had been proposed; and had proceeded successfully to the liquidation of a large proportion of the debts designated in the Act, and that those bondholders had an equitable right to insist they should not be otherwise applied under the contract contained in the Acts. This Court reversed the judgment of the Circuit Court, so far as it called in question the power of the State to settle the debt, in any manner she should devise, but that these bonds had been appropriated and were possessed, so as to be without the legislative control. The board had them in possession. In the case of Osborn, the decree of this Court did not affect any property of the State of Ohio. The Court had enjoined the seizing agent not to molest the bank before he had done so. The Court ordered him to hold the property seized, while he had it on his person. The Court, after demonstrating the illegality of the act of seizure, ordered the wrongdoer to make restitution to the injured owner of the specific article in hand. In the case of Gray, Receiver, the fact is admitted that the receiver held the property under the orders of the Court. The aim of the bill was to secure the title from deterioration, while under the control of the Court from interfering and incumbering rights which might be placed on the real property. The State of Texas was all the time the owner of the fee simple, and the contention was in respect to claims of an equitable character dependent upon the laws of the State. She had no interest in the controversy.

We are careful in the examination of these cases, for they are always cited whenever the title of a State to her sovereign claim is presented, as affording a satisfactory device, which had been contrived to relieve the Courts from any disability on the subject of a coveted jurisdiction. In a late publication by a New Hampshire jurist, the decision in the case of Osborn is described to be in effect "that the amendment did not prohibit the bringing of suits against the State, and was not so intended, but simply changed the form of the process and of the docket entry, and provided that the name of the State should be

struck out, and those of its officers, its other self, should be substituted for it."

Shirley, Dartmouth College Cases, 373.

In the cases before this Court, the State of Louisiana is charged in every case as the only debtor before the Court; or within the scope of any demand exhibited to the Court. The written evidence of debt which every case prefers for their observation is of the same class and import. New Hampshire, New York, and the Syndicate, make in their pleadings the same allegations, as the motive for their presence. In the cases of New Hampshire and New York, Louisiana is the party, and only party of importance. The Syndicate have followed the New Hampshire interpretation of the judgments of the Court in Osborn's Case, and adopted all of the changes in docket entries, and substitutions of parties and names that this recipe inculcates. The case of Chisholm vs. Georgia, is the leading case cited in the briefs as an authority.

The Constitution as published by authority is, "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." There is, however, an unpublished proviso to this article, to the effect, that, "*Courts of Equity may proceed to decree against the officers of a State as if the State were a party to the record, in cases wherein the State has a right or interest as if the State had been duly cited.* History tells us that there were forms of procedure which were for a long time concealed; and of esoteric doctrines, as distinguished from exoteric among philosophers.

In these cases the plaintiffs have informed the Court that the officers, who are defendants, did not make the bonds, nor have any title to any portion of the money in the Treasury of the State; that they are there under the strongest obligation, both moral and pecuniary, to refrain from using one centime of it

without the command of a superior authority, the Legislature of the State. In respect to these written evidences of debt, the coupons, they have no authority to perform a single act. The debt ordinance allows them to put a stamp on the bonds at the request of an owner, and till that be done, they have no official function to perform. The State, the owner of the money in the treasury, and which has commissioned these officers with these limited authorities must be deposed. The officers, by the decree of the Court, are to be substituted for the State, and they are to be commanded to perform the function which the Court shall find with the best lights they have in the absence of the only party in interest, the State should have directed, viz: That the officers shall examine the titles of the plaintiffs, to ascertain their validity, whether there has been any payment, release, accord and satisfaction, fraud or error, and if none, to certify the debt, draw the proper warrant, and obtain payment of the coupons offered in evidence.

The first question to be decided by the Court in the cases of the Syndicate is, that the State is a debtor as charged in the bill—that all the allegations are established by adequate proof, such as the law requires after notice to the person charged. The Constitution has made no provision for the substitution of parties to represent the State, nor for this inquisition into her affairs, in her absence; nor for a *curator ad hoc;* nor guardian *ad litem* to answer for her. Louisiana has no statute or rule whereby she can be made a party to a suit, and has none appointed to appear for her.

One is at a loss to find words more emphatic than those the Constitution employs to reprobate the demands of this Syndicate. The judicial power of the United States shall not be construed to extend. The judicial power of the United States is under the dominion of Congress in a large measure. Congress must never construe this power as extending to what follows—Congress must never pass a law to vest the power in any Court having jurisdiction at law or in equity, to do what is contained

in this amendment; nor must the Courts construe the judicial power to extend; nor shall the president construe the judicial power to extend to any suit at law or equity, commenced or prosecuted against a State by an individual.

The claim in the bill is, that the Constitution and laws of the State can be avoided, the keys of the treasury seized and the money applied, and that the laws may be steadily enforced that are set out in the bill year by year, in a suit in which the State is not a party.

We have endeavored to vindicate the decisions of the Court from the disparaging and dangerous criticisms that have been made, and from the bold and confident efforts to induce the Court to make interpretations that would justify the criticisms. We have the careful and labored judgment of the Supreme Court of Louisiana, that the judicial power of that State does not extend to the rendition of the judgment, such as the bill of the Syndicate demands.

The appropriation of the money of the State in the treasury belongs to the Legislature as representatives of the people. Here is no case of ministerial duty committed to officers, and where no discretion exists. The application has been made by the existing Government, and who are in possession of authority, and who have immediate control over the public property. In dealing with such a case, no subordinate in administration can be selected for suit, the State is the only party in responsibility or interest.

The answer made is, that the acts passed in 1874 are contracts, entail obligations, are protected by the Constitution, and may be enforced by the Courts, notwithstanding the impairing constitutional and legislative provisions. That the property in the treasury was raised to meet the obligations, and that the creditors have a title to a compulsory enforcement of the sums raised.

The bills show, the answers declare, the testimony proves, and the decree in the Circuit Court establishes, that whatever has

been done in relation to the execution of written evidence of debt, of the assessment, collection and distribution of the taxes, has been the action of the highest authority in the State, in the exercise of her supreme power under the Constitution reserved to her. The last and dominant expression of that power is, that the money in her treasury is disencumbered of any claim that the Syndicate has preferred. The subordinate members of the government affirm an entire inability to fulfil what they require to be done, and the Syndicate comes to the Courts of the United States for a reinforcement.

The inquiry comes back: Does the judicial power of the United States extend to the doing what is asked for in these two cases?

The judicial power of the United States is not plenary over the subject of contracts. Nor is that jurisdiction conferred for the enforcement of contracts or to maintain their obligation inviolate. The judicial power extends to a very large and important class of cases in law and equity arising out of the Constitution and the laws of the United States, and controversies between certain classes of individuals and States. The judicial power does not extend to any case of law or equity where a State is a defendant. The precise effect of a suit on a contract is to compel the debtor to pay what he owes, or to perform what he has agreed to do. Had these bonds or coupons been issued by New Orleans, for example, an action of debt on the coupons would have been commenced. A mandamus to compel the exercise of a franchise allowing taxation would have been competent. Had there been collected under a statute, a fund deposited with a distinct and separate agent, apart to pay interest, a remedy in equity to prevent a misapplication would have been allowable. In all of the cases there would not have been but one necessary defendant—the City of New Orleans. Nor would any Court for an instant listen to a motion without the presence of this defendant. For the reason that the supreme law of the land has

in plain and unequivocal language prohibited all the citizens of the Union, official or individual, from making suits, or finding authority for making suit against a State, these measures for circumventing and defeating that supreme law, and thus carry on a suit against the State, have been invented. The State is not sued directly, or *in personam*. The suit is to compel certain officers to do or forbear, whereby the debt of the State will be paid behind her back, with her own money, and contrary to her orders.

The acts of the Legislature in 1874, and the Constitution, are assurances or securities for the bonds. They contain agreements to use the powers of a State for the collection of money to pay interest and principal without defalcation. They are accessorial, subsidiary, executory agreements, whereby the treasury would be supplied regularly and sufficiently. The creditor would have the fruit when he presented his coupons at maturity.

Upon a default the creditor complains that his contract has not been fulfilled. The State is the debtor. The State has countermanded collection and appropriation. The State is the responsible party for the default.

The remedy of the creditor cannot be found in any Court. Suppose the State had granted a mortgage upon a township or a county of lands belonging to the public domain, and the State remained the owner of the land, and there was a default. No suit for a foreclosure or sale could be commenced in equity any more than a suit at law upon the bond in the Courts of the United States. Where no judgment nor decree can be pronounced upon the primary obligation because the obligation is imperfect, or the obligor not a subject of suit, no judgment nor decree could be rendered upon the accessorial, secondary and executory agreement. The primary stands alone, is not dependent. The accessorial is dependent, and is not enforceable without proof of the primary.

In these cases the plaintiffs have annexed to their bill a schedule of their debt against the State, and their demand is for

payment of the debt; the debtor being beyond any action of the Court by the Constitution of the Court. Nor is there anything marvelous in this legal Constitution of the Court. The obligations of States are imperfect obligations. They may be bought and sold, hypothecated, bequeathed, or donated, and the owner may accept payment of the money due. They are not enforceable by suit. Under the Act of Congress, passed in 1790: (1 Stat's at large, 138, ch. 34,) the United States pledged all of the receipts of duties from merchandise, tonnage, and from the sales of public lands, with some reservation for expenses of Government, for the payment of the public debt. The Act provided for preserving the money apart from other money, and for particular statement of the accounts of receipts on the books. The government in the first decade was embarrassed, and had a war occurred, might have been in default. Could a bond creditor have compelled a payment in such a contingency? What judicial process can coerce administrative action upon the pledges contained in the sections of the Revised Statutes, 3687, 3688, 3693, 3694, pp. 729, 735. These are as explicit as those of Louisiana. The cases we have cited show that the United States have habitually claimed immunity from suit, except in those cases where for convenience of administration they have delegated to her own Courts, the exercise of her own judicial power against herself. In the fundamental law of the United States, the people have prohibited the employment of their judicial power against any State of the Union by any citizen, and yet these cases are cases which no Court of the United States would entertain, were the United States the party concerned. It is sometimes represented that this amendment was a merciful concession to the States, to calm the timid and trembling apprehensions of indebted and impoverished States who were flying from their greedy and unrelenting creditors. I find a contradiction of this statement in the history. The law of this amendment is the recognized public law of the States of Europe.

1 Calvo, Droit Int., Secs. 536, 538, 540.
Dalloz, 1867, 2, p. 50.
Dalloz, 1879, 2-9.
Dalloz, 1849, 1-9.
See briefs, 32, 34.

We have cited two cases from the Court of Appeals in Great Britain. The first was a cause of collision, wherein an unarmed packet ship belonging to a foreign Sovereign, commanded by commissioned officers, and employed as a carrier of public mails, merchandise, and passengers for profit, was proceeded against *in rem*. The law officers of the British government appeared, and moved to dismiss the suit, as not allowed by the law of nations. The opinion of the Court is full on the general question. I quote a paragraph as pertinent to the cases from the Circuit Court as to parties. The Court say: If the remedy sought by an action *in rem*. is as we think it is, *an indirect mode of exercising the authority of the Court against the owner of the property*, then the attempt to exercise such an authority, is an attempt inconsistent with the independance and equality of the State which is represented by such owner. The property cannot upon the hypothesis be denied to be public property. The case is within the rule; it is within the spirit of the rule. Therefore we are of opinion, that the mere fact of the ship being used subordinately and partially for trading purposes, does not take away the general immunity.

Parlement Belge, L. R., 5 Prob. Divis., 199.

Another opinion, delivered in Twycross vs. Dreyfus, 5 Ch. D., 605, is pertinent to the same discussion in the suits of the Syndicate. The case was before the Court of Appeals to collect Peruvian bonds from agents of that government. Lord Justice James said: "It appears clear to me that the defendants are nothing but agents of the Peruvian government, and fill no other character whatever. They may have on the balance of account between them and the government proceeds of guano,

or other moneys available for the payment of the bonds, but that is between them and the Peruvian government. You cannot sue the Peruvian government. And it would be monstrous usurpation of jurisdiction in my opinion to endeavor to sue a foreign government *indirectly* by making the agents in this country defendants, and then saying you have got the money, and you ought to apply it, thus endeavoring to make the foreign government responsible to the Court." The pledge of security contained in the Peruvian bonds of these consignments of guano to the agents are as explicit, and the existence of money as derived from them in the possession of the agents was confessed by the demurrer to the bill. The resemblance of the cases is complete. The Justices agreed that the immunity from suit was as clearly violated by the indirect mode pursued of a bill against the agents, as it would have been by a suit against the government itself. The opinions we have quoted testify the scrupulous regard of these enlightened Justices to the rights of the absent, and to their own sense of the necessity in all points of honor to preserve the immaculate whiteness of their high office. They were not willing under the grave responsibilities resting upon them to exercise their judicial power under any conditions of indirection or of usurpation, or other devious methods. We have cited on the brief another case, where the ingenuity which was invoked to find a cause to sustain a jurisdiction did not receive encouragement.

Pryse vs. Pryse, L. R., 15 Eq., 31, 32.

The case of Chisholm vs. Georgia was a case of first impression in a Court newly organized, and composed of men who had not previously exercised the judicial office. The argument was limited to a single side. Justice Wilson commences his opinion with the statement that it was a case of uncommon magnitude. "One of the parties to it is a State certainly respectable, claiming to be *sovereign*. The question to be determined is, whether this State so respectable, and *soaring so high*, is amena-

ble to the jurisdiction of the Supreme Court of the UNITED STATES. This question, important in itself, will depend upon others more important still, and may, perhaps, be ultimately resolved into one no less radical than this. Do the people of the United States form a nation? He proceeds to argue that the people of the United States are sovereign, and "might have announced themselves *sovereign* people of the United States; but, serenely conscious of the fact, they avoided the *ostentatious declaration.*"

The question is stated with more simplicity, and was found to be more intelligible as it came from the counsels of the general Court to the Governor, Hancock, and was submitted to the Senate of the United States by their direction and by their Senator, and adopted by Congress—and was remitted to the Legislatures of the States and by their concurrence became a part of the Constitution.

We are able to find in this history the explanation of every word in this clause of the Constitution. It will be seen that there was submitted to the general Court of Massachusetts the subpœna served on the Governor, and the opinions delivered by the Justices of the Court in the case of Chisholm vs. Georgia. The subpœna commands the Governor and Attorney General to lay every other thing aside, and, notwithstanding any excuse to appear before the Supreme Court of the United States in Philadelphia to answer concerning the things which shall be then and there objected to the commonwealth of Massachusetts, and to do and receive on her behalf what the Court shall have considered in this behalf, under a penalty of $400. The General Court met, and on the 27th of September adopted resolutions which refer to the decision made in that case by the Supreme Court as a grievance, and which instructed her Senators and requested her representatives to take the most speedy and effectual measures to obtain such amendments to the Constitution of the United States as will remove any clause or article of the said Constitution, which *can* be construed to *imply* or

justify a decision that a State is compellable to answer in any suit by an individual or individuals, in any Court of the United States.

The fact that such a mandate had been addressed to the commonwealth was the precise cause of complaint. It may have been that the Governor and the Attorney General had read where Madison had said, in the Virginia Convention, "It is not in the power of individuals to call any State in Court," or what Marshall had declared, "It is not rational to suppose that the sovereign power shall be dragged before a Federal Court." Here was the mandate peremptory and menacing as if the State were an offender. It is not to be assumed that there is any concession that a foreign State is entitled to come into this Court at her pleasure, and to obtain the process of the Court. In whatever concerns the foreign relations of the United States, all agree the United States have plenary control, and that a State should be sued against her will has not been decided, and much may be said to the contrary. The solution by Madison and Marshall in the Virginia convention, is one to be carefully considered before any adverse opinion can be accepted. The amendment has been the law of the country since the Declaration of Independence.

No State has ever appeared to any suit commenced under the last clause of the second section and first paragraph of the third article of the Constitution. We have been considering here whether in three cases cited by our opponents, the rights of property of a State have been disposed of by the Courts of the United States with the sanction of this Court injuriously in their absence, and by a side wind such as prevailed in some Courts and communities to reach a result.

But on examination the imputation is proved to be unfounded, and that the authority confided to the Court has not been abused. Nor in the century that has elapsed since this immunity has existed, has there been any inconvenience to follow from its existence. The cases before the Court are tentative

efforts to change all the conditions of the judiciary organization, and to alter the Constitution, and the business of the Court, so that it may become involved and inundated with the debauching and corrupting litigations of those who make a merchandise of such things.

About the time of the decision in the case of Chisholm was discussed, an orator and a philosopher in another continent was propagating the opinions that the existence of nations was an obstacle to the emancipation of the human race. We are not free if any obstacle stops our march over any portion of the globe. An aggregation of persons that calls itself sovereign, affronts humanity. The rights of men extend to the totality of men. Nations are the scourges of mankind. It is necessary to remove all aggregations, termed Peoples, Nations, States, assemblies, kingdoms. . A republic of the human race will have perpetual peace. There is no bridge of communication with the planets. The adventurous speculators of this country seem to be as impatient of constitutional or legal barriers to their schemes for hasty accumulation, as were those speculators abroad who are unreconciled to anything stable or permanent.

The bill of the State of New York has a distinctive claim in behalf of all of the citizens of the State who have or may acquire demands upon the State of Louisiana, and is a harbinger of the time when those remarkable engines that are spreading dismay in the oldest of all the nations of Europe, and wonder everywhere will bring us universal peace.

VIII.

Beside the claim made by New York upon the assignments of two of her citizens of their coupons, according to the invitation contained in her Act of May, 1880, the bill filed in her name, signed by her Attorney General, and prepared by the solicitors of the two coupon holders, introduces another claim of New York, for a decree of a wider scope. All of her citizens

who shall have become holders of Louisiana bonds, have become the subjects of the patronage of the Attorney General, or the Solicitors of the assignors, if not of the legislature, and a claim is preferred in the bill on their behalf. Three witnesses have been examined who say they have bonds, and have heard of others that had them, but none have been produced and filed in the record. The argument submitted in the brief of New York is, that having been a sovereign, and with powers to make war, issue letters of marque and reprisal, and otherwise to act in a belligerent way, she resigned these powers into the control of the United States, to be held in trust, and therefore this Court must make decrees in the cases in favor of the plaintiff, for judgment, making declaration of the default of Louisiana, and to subject her collecting agencies and accounting officers to the demands of the bill, and to compel the collection of taxes, to pay all the holders of coupons and bonds within the State of New York their interest and principal, from year to year, till the debt becomes due in A. D. 1914.

No precedent of such a suit has been cited, and we must admit the present has the merit of originality and invention. We have referred the Court to the debate and the report in the British House of Commons in 1875, in respect to foreign loans conducted by a member who is now Attorney General. Reference is made to the bellicose speech of Lord Palmerston, on a similar subject, in the year 1846, cited by the plaintiff. In this debate of 1875, the Chancellor of the Exchequer, (Northcote,) and the Foreign Secretary, (Earl Derby,) expressed decided and adverse opinions in respect to diplomatic interference in cases of personal losses by English capitalists, in cases of loans to foreign governments. During the same parliament the subject was again considered in respect to defaults committed by Turkey. The testimony of the leading bankers of Great Britain, and of the great financiers of Europe, is a dissent and contradiction to any policy or right to use governmental power in such cases. The

declaration of the Earl of Derby, the Foreign Secretary, and of the Chancellor of the Exchequer, and a paper communicated by one of the ministers, we append to our briefs.

222 Hansard's Deb.; 225 Hans. Deb., 202.

Another case cited in the brief of New York is that in which Lord Palmerston exacted indemnity from Greece for wrongs done to a British subject, Pacifico, as he alleged. Without making a statement of the facts, we shall content ourselves with reading to the Court from a late publication on international law of reputation. The author, referring to the case of Pacifico, cited, says: The conduct of the British Government upon this occasion aroused the indignation of all Europe. Russia, in a letter dated 19th February, 1850, addressed an earnest remonstrance through her ambassador. The Chancellor of the Empire (Nesselrode) concludes: "The reception which shall be made to our representations is destined to throw full light upon the relations which we henceforth shall have with Great Britain, and I will add, on her position as regards all foreign powers, great or small, whose coasts expose them to a sudden attack. It will disclose whether the British Government, abusing her immense maritime supremacy, has assumed a policy of isolation without reference to connections with other Courts, by disengaging herself from all common obligations, all solidarity of action, and so to authorize every great power, whenever she finds opportunity or occasion to recognize, towards every feeble power, no other rule than her will, and no other law than her material force."

The *Times* newspaper acknowledged "the dispatch to be irrefutable, its conclusions just, and its reproaches pungent." The House of Lords passed a vote of censure, by a majority of 36, on motion of the Earl of Derby, and Palmerston was put upon his defence in the House of Commons, and escaped by a very great effort.

2 Calvo, Droit. Intern., pp. 604, No. 1579.

Among the citations which are found in the brief of New York to illustrate her losses by her connection with the United States is, that she could not do as France, Great Britain, and Austria, had done in 1861 in respect to Mexico. These powers invited co-operation from the United States, and the United States answered if the purpose was to have a financial settlement that was not difficult, and the United States would co-operate. The response was, that besides this, they required to be assured, that for the future, by the establishment of a serious, efficacious and permanent protection of persons and property in Mexico. The United States did not co-operate, and France undertook the conquest of Mexico and the organization of an Empire.

The relevance of the case to the discussion is not distinctly understood.

The claim of New York stands on the proof of a debt for the sum of $1,060 in coupons, which the State obtained from two of her citizens, wherewith she could maintain a suit under her statute. Three witnesses have been examined to inform the Court that they too had bonds, and approved this proceeding, and that there are others in a like condition. None beside the two have accepted the Act of New York and made a transfer to the Attorney-General. Calvo remarks upon the demand on Mexico by these great powers: "If in principle it is difficult to admit that governments are justified to yield their recognition, their support, their direct intervention in behalf of subjects who freely lend their money to foreign governments, at the least, reason and equity require that when such interference with private contracts takes place, it should be commenced and conducted with a full understanding of the cause, and not with LEVITY.

1 Calvo, Droit Int., p. 296.

The suit of New Hampshire was commenced in this Court for the sum of $210. An injunction was moved for, and a

decree to declare law and constitution invalid, and money withdrawn for the State Treasury. New York improves upon the case. She has attracted two of her citizens to accept her overtures. Their debt combined is $1060. This debt was assigned, and a suit is thereupon commenced to collect this sum, and that a decree be made by the Court to direct and enforce the payment of interest and principal under the directions of this Court from the date of the decree till the summer of A. D., 1914. It is impossible not to contrast the conduct of the State of Massachusetts, and the conduct of Governor Robinson of New York, favorably, with such proceedings.

The third case cited in respect to reprisals, is a message of President Jackson in respect to France. It required the large capacity of Edward Livingston, then Minister of the United States in France, and the Senate under a leadership adverse; the interference of Great Britain, and the good sense of the people, to prevent serious complications with France for no offence whatsoever.

2 Writings of Gallatin, 494.

Reprisal is found in the Constitution of the United States. It represents now an obsolete idea among civilized nations. The thing is prevalent among the Comanches, Sioux, Blackfeet, and Cheyennes; and seems to have been thought of in New York, if Knickerbocker can be relied on as a historian. In the 10th and 11th centuries they were usual and prevalent. Those were centuries when robbery and pillage did not offend the general conscience. The law of force was predominant, and men rendered homage to the strong. But every right implies a reciprocity, and inferior force did not surrender its own claims. There were wars, contests, quarrels, combats, reprisals; violence begat violence; and ended at last in equilibrium. Organization, discipline, combinations, laws, caused the formation of States, and banished reprisals to the seas, and since then from recogni-

tion as a lawful mode of settling disputes or a proper mode of redress.

IV Muratori Antiq., pp. 49, 42.
5 Ducange, Glossarium verbo Repraesaliae.
1 Laurent, du droit Int., 260, 261.
W. E. Hall, Int. Law, 312.
3 Science du Publiciste, (Fritot,) pp. 252–5.

Calvo says: "that the law of nations which ruled the world to the end of the last century, and which reflected with some temperament the writings of Grotius and Bynkershoek, embodies principles which the civilization of the nineteenth century disapproves, and the modern international law disavows. It was a long time held that the person injured, whether in person or property, was authorized to obtain indemnity directly and immediately from the person who wronged him, and from any other person, public or private, of the same nation." It is conceded that New York surrendered her authority to maintain or support armies or navies, or to conduct war, more than a century ago, by articles of confederation, and that Congress has all the power that exists in the United States for such purposes; but there is no provision made for New York to substitute this Court as a place for venting the individual complaints of two or even more of her citizens. The Constitution has made every provision for the citizens of New York to appear in the Courts of the United States, deemed suitable by the authors of the Constitution, and the claim made by New York and her citizens has been disallowed, her own vote having been given in favor of the prohibition to do so.

In the year 1853, the United States and Great Britain concluded a convention for the adjustment of the claims of their citizens and subjects respectively, by means of a mixed commission, and that the decisions of the commission should be final. One of the claims presented arose upon an issue of bonds by the Florida Territory, and loaned to the Union Bank of the Territory to obtain capital. Another claim was upon an endorse-

ment of the Territory on an issue of bonds of a moneyed corporation. Both corporations became insolvent, and these bonds had not been paid. The United States were charged as having established the Territorial government, having a supervision of its laws, and a veto upon any act of the Legislature. The claimants urged that the United States had admitted Florida into the Union as a State, with an immunity from civil suits to their prejudice, and that the United States was a proprietor of lands in the State, and had stood in such a relation to the Territory, that in justice and equity they were bound for her debts. That a moral obligation is as high a claim as can be made against a sovereign power, and is as fully obligatory against such a power as a legal obligation. That a moral obligation is the only claim that can exist against a State. This argument was submitted to the UMPIRE, Mr. Bates, by Cairns as counsel, supported by Hannen. The umpire disregarded the territorial condition of Florida as of no importance, as there was no evidence that the United States was a party to the debt, and because that no such claim had been made upon the Metropolitan States for debts contracted by colonies. He said: "The bondholders have the same remedy against the State as they had against the Territory; they have a just claim. But they are under a well known disadvantage in both cases. They cannot sue a Territory; they cannot sue a State." He says: It has been urged that there is no way of getting at a State government, except through the government of the United States; this is a mistake. There is no difficulty in the way of individuals dealing with the separate States in any matters that concern the State alone. Nearly all the States have public works, and contract loans with individuals, American and foreign, and any person aggrieved may petition the Governor or Legislature for relief. A State cannot deal with a foreign government; the intercourse with foreign nations belongs to the general government. The umpire concludes: The bondholders have a just claim on the State of Florida, they have lent their money at a

fair rate of interest, and the State is bound by every principle of honor to pay interest and principal, and it is to be hoped that sooner or later the people of Florida will discover that honesty is the best policy; and that no State can be called respectable that does not honorably fulfil its engagements."

Report Commission for Settlement of Claims between United States and Great Britain, to Senate, 1856, p. 246.

We find here a lucid statement of the condition of the public law as well understood in Europe as in America, and as known in 1874, when these bonds were issued. The bonds for two or three years did not have a market value equal to their value now, and since the Constitution of 1879, and were there a remedy, such as is proposed here, the fact of depreciation would be unaccountable. Had there been an impression that the officers before the Court, were suable as a substitute for the State, and that the State was bound by such a judgment, the creditor would have had no misgiving. But the State as organized under the Declaration of Independence, and as she existed under the confederation, and as a member of the Union, cannot delegate to a board, or to officers, irrevocable powers of taxation, to be exercised by them under an independent, separate jurisdiction, having no responsibility to the State. A State can no more barter, sell, nor abdicate her position in the Union as a member, and her sovereign attributes as a State apart from her relations as a member of the Union, than she can make treaties, alliances, and refuse to take representation in Congress.

It is the opinion of this Court that the Union is perpetual, and the States are indestructible. That place determines their rights and duties, some of which are not subject to any transfer by any form of contract. It is so with persons. The law does not permit a citizen to change his status as a citizen, or member of society. He cannot alienate his right of suffrage, or as a husband or a father. He cannot pronounce his own insanity, nor decree

his own interdiction. He cannot sell his freedom, nor bind himself by contract with a creditor to go to prison, nor surrender himself to labor for him at his pleasure to pay a debt. The order and arrangement of American society under Constitutions, laws, usages, forbid these. So does the same order and arrangement require that the State shall remain undiminished, so as to rule all of these free citizens, whether separate and distinct as men, or as belonging to counties, towns, municipal or chartered corporations, or voluntary associations, or existing as families and groups, the State being the result of the exercise of dominion, power, faculties and energies of all, in whatever relation. The frame of the bill of New York is to place the State into the hands of a receiver for a third of a century.

Louisiana, through her conventions, Legislature, and people, after a review of the condititon of her population, and the calamities resulting from war, the loss of virile population, a convulsion in property, and social revolution, pestilence, floods and irresponsible and profligate government imposed on her, decided that the revenues of the State were not adequate to the expenditures needful. There is retrenchment in the Constitution adopted in 1879, and an anxious purpose to prevent misgovernment in the future. There was an abatement of interest on an issue of bonds under the Acts of 1874.

New York comes like a belligerent, bewailing her loss of capacity to make reprisals, and in lieu demands a receiver or some interdictory process whereby the State shall lose her powers of administration and government, and this Court is for a long period to perform functions not unlike those of a Brigadier in a State reduced to a department, to undergo reconstruction. The Courts of Louisiana properly decree that there is no power among them to perform the act required.

The Constitution of the United States does not allow of a treaty, alliance, confederation, agreement or compact, with any other nation or State, whereby any sort of control, constraint or influence shall arise to deteriorate or lessen the independence

and equality of any State as a member of the Union. All of the States of the Union, by their fundamental laws, place their treasury under the control of the representatives of the people. This was the right obtained by the war of independence. History tells of a King of England who borrowed money from one of his nobles, and assigned the Jews as a security, to be tallaged by the creditor, at his discretion, for the repayment of the loan. But this people were regarded as aliens, and not within the protection of the customs and laws. The basis on which English liberties was erected is, that no general tax shall be imposed without the consent of the nation, expressed in the common council of the realm; and the enforcement of honest dealing in the raising and expending of money, and the adjustment and limitation of taxation, and the securing of the people from the consequences of impoverishment, maladministration, financial overreaching of the government, royal or republican, have been the objects of all constitutional statesmen in every country. These have relied upon the representatives of the people. The King might assign an alien population to be taxed, but he cannot impose a tax on his subjects without the consent of the Parliament.

The enactments by the Legislature of Louisiana in 1874, and the constitutional ordinance of the same year, are declared to be obligatory as contracts. The bond is a convention or covenant to pay money at stated periods, and the laws acknowledge the binding effect, and undertake to supply the treasury with money by a specific levy of taxes annually, which shall be applied to the payment of the interest and principal as covenanted.

The enactments relative to the collection and appropriation of taxes, so that money be collected in the power of the State to pay the bond, has no higher obligation nor other sanction than the bond itself imposed. The engagement in the bond is to make payment of the bond according to the promise. The promise of the act is to provide the money for that payment by a specific tax. The obligation is fulfilled by the payment of the

money as promised. The question arises: Can this Court enforce the bond by a judicial process or proceeding?

The United States have no judicial power which comprehends a State, nor the property of the State, nor the contracts of a State, with any object of controlling her property, or enforcing performance of her contract. The fact that the United States may not do this, would seem to be an adequate answer. It is the State in the full exercise of sovereign power that has adopted the constitutional ordinance of 1879, and declared in what manner the public obligations of the State shall be performed. There is no authority in Louisiana that can overcome the force of this resolution, except the power that so resolved. The power of the State to contract debts, and the power of the State to adjust their debts according to their own sense of obligation and duty, is not withdrawn from her by her own Constitution, nor the Constitution of the United States. When the State made the debt, and made the arrangements to pay the debt, she was independent of control, and was not constrained by any legal or political sanction that Courts can employ. What Austin says on this subject is irrefragably true. The laws which sovereigns affect to impose on themselves, or the laws which sovereigns affect to impose upon their successors, are merely principles or maxims which they adopt as guides, or which they commend to their successors. The sovereign, for the time being, is not constrained to obedience.

Austin on Juris., p. 271.

My application of this citation to the States of the Union only embraces the power and authority of a sovereign character that are comprehended within the ninth, tenth and eleventh amendments to the Constitution, the Keystones of the Constitution of the United States.

It is not difficult to establish to the entire extent the proposition that States in all ages and of every degree, have employed this sovereign power over their receipts and expenditures, and

have exercised over their contracts and debts a control both identical and analogous to that which is embodied in the debt ordinance. We read that when Hannibal had failed in his attempt to conquer Rome, the Roman Senate debased her coin to one-sixth of its current value; and with that coin paid her debts to her legions, and that alterations of values took place in the time of the republic, and under the empire repeatedly. We know that the English pound sterling now is not one-third of its original value; and that it was depreciated in order to diminish the debts of the crown. Burleigh, in the time of Elizabeth, applied a correction.

We know that the French livre was debased more than doubly as much as that of England. Three times during the eighteenth century did that kingdom declare her bankruptcy, and adjusted her debts by a law. In 1793 the republic called in the evidence of her entire debt, and the Grand-livre of the public debt from thence should be the only title of any creditor. In 1798 two-thirds of the inscriptions were reimbursed by certificates to be used only in purchase of the public domain, which in a little time were without value, leaving only one-third of debt remaining. A portion of the debt had been contracted A. D. 1375, and had undergone in the five centuries the abrasions of bankruptcy, but leaving a portion of the debt still unpaid. Great Britain, in 1797, directed the suspension of specie payments, and the forced circulation of the bills of the Bank of England, lasting for 22 years. We know that the debts and engagements of the confederation were assumed by the United States under the Constitution, and that the domestic debt was settled by the reduction of a part of the principal; and continental money was redeemed with one for one hundred, other issues one for forty. That the payment of interest was deferred upon other portions of the debt till the year 1800, and generally reduced so that the treasury should not be overburdened, and that public credit might be restored. By every State of Europe, except Great Britain, under the pressure of war, internal commotion, public calamity and improvidence,

within a century, similar expedients have been resorted to. Philip IV, of France, is described in history as covetous, unscrupulous, cruel. He debased the coin and issued it at the nominal value, and would redeem it or receive it in payment of taxes only, at its intrinsic value. Dante describes him as a malignant plant, a modern Pilate; and when the poet has in the Paradise a vision of those books wherein the misdeeds of men are written down for the Judgment, he is reminded of the evil the man on the Seine had done in falsifying the coin—*falseggiando la moneta.* A modern Publicist, in recounting the changes in the standards of coinage in different countries, and the adulterate currency circulated from time to time, under stress of necessity, or more frequently because of profligate and unwarranted expenditure arising out of a vicious policy, and citing the debasement of the money in France, Great Britain, the United States, Russia, China, and nations of Europe, leading to commercial embarrassments and individual ruin, says that these great Empires and States had followed in the footsteps of that King, whom Dante had branded as a counterfeiter—*un faux monnayeur.*

The cases before this Court do not require nor allow of explanations nor apologies for Louisiana. The State has said to her assailants, whether States of the Union or citizens of States of the Union: "Who art thou that judgest another man's servant? To his own master he standeth or falleth."

The colonial history of this country is not wanting in instances of embarrassments, miscalculations, extravagance, and an undue appreciation of paper money, and an inadequate sense of the mischief of debt. Nor is the history of the United States during the century of their independence destitute of those instructive and costly lessons which our wise Franklin has told us that come from that stern master—Experience. Their well-being has compelled, or was supposed to compel, excessive issues of paper money, the suspension of cash payments by banks, the forced circulation of bills of credit, and the funding of debt upon

terms of composition. The American creditor has complained out of Court, and in Court, that the obligation of his contract had been impaired and his vested rights had been infringed. The empire State, too, has extended forbearance and clemency to imperial institutions by suspending the effect of her laws. In these cases the policy was, perhaps, judicious, the mischiefs exaggerated, and a benefit attained—perhaps not. But the facts show that there has arisen, and will continue to arise, conditions where the law-making power must deal with such conditions upon principles that frequently inflict damage on individuals, and apparently violate sound principles of law and economy. The solution of such questions cannot be made in the decision of a CASE at law or equity. The laws are evoked because of the complication in public affairs. They are relative to government and the conduct of administration, and are needful to the attainment of ends by the employment of such means as the State has. In the guidance and administration of a State, there is nothing to be set down as immutable or irrevocable. The legislation, whatever it may be, ought not, except in few and unfrequent cases, to assume for any one the definitive character of property. It is also in respect to a State of this Union. A State, like the United States, must retain powers adequate to the exigencies that may arise in its own condition. That condition is mutable, and the exigencies to arise are not manifest, sometimes not discoverable. It must therefore be always free to provide for permanent and steady security in the administration of the affairs of the State. It is not competent for her to disable herself by any alienation of her powers for this purpose, nor be controlled in their exercise. Nor can any presumption be entertained that she has done so. In the case of Chisholm vs. Georgia, the Court seemed to suppose that the most extensive interpretation was proper to subject the State to suits as corporations, and because the Court was armed with supreme and unrestricted judiciary powers. Neither of the assumptions were

justified. One of the amendments submitted by New York, avowedly as explanatory, was: "That the Constitution under consideration is not to be construed to authorize any suit to be brought against any State in any manner whatsoever." This was submitted by Samuel Jones, and sustained by Hamilton and Lansing. It corresponds with the Massachusetts resolves, and with Marshall's exposition to Virginia. Nor can there be on principle, to the recognition of this immunity as one of those faculties the States had not delegated or ceded to the United States Government, a rational exception.

The States of the Union had maintained the war of the revolution. The delegates to Philadelphia to amend and to reform the confederation were appointed by their Legislatures. Those Legislatures now elect a branch of the Congress of the United States, and thus participate in the confirmation of federal officers and the formation of treaties. They command and train the militia of the Union, and have power to regulate the making of contracts, the law of succession, instruction, the transfer of property, and what relates to domestic and social order and tranquillity. The States have a republican government, a magistracy, civil administration, and a body of people. They belong to a Federal Union, and have interstate relations—as independent and equal States—enduring and indestructible. There is unity, force, duration, rights, faculties, which enable them to be separate, distinct; and constitutions and laws, of which their public power is the minister, and which develop consequences, for the amelioration of the condition of the State, as well as of the Federal Union.

With no particular admiration for the equivocal and undefined words, sovereign, national, federal, republican, or democratic, we can safely affirm that a State thus existing and thus connected ought not to be the subject of a judicial writ or warrant, unless her own consent has been plainly given in any manner whatsover.

Had there been no eleventh amendment, and had the Constitution remained as it was when ratified by the States, this was the fair, appropriate and necessary construction of the Constitution; and so far from there being any cause for the subjection of the States to such a jurisdiction by anything that has arisen since, the experience of the past has multiplied reasons for maintaining the Constitution inviolate.

JOHN A. CAMPBELL,
Of Counsel for Defendants.

J. C. EGAN,
Attorney General, Louisiana.

APPENDIX.

A.

EXTRACT FROM BIOGRAPHY OF SAMUEL ADAMS.

One feature in the original form of the Federal Constitution to which Mr. Adams had objected, was the amenability of the States to the National Courts. His letters on the subject predicted disputes between the federal and State authorities, unless the instrument was amended in that as well as in other particulars. One of the amendments proposed by the Massachusetts convention limited the amount in which the Supreme Federal Court could have jurisdiction in cases between citizens of different States; but the suability of any State by individuals through that Court does not seem to have been suggested in the debates. A Judge of the Supreme Court having decided that a State could be sued by an individual, a suit under that ruling was instituted against Massachusetts by an alien. This was shortly before the death of Governor Hancock, who summoned a special session of the Legislature, when it was resolved to take no notice of the suit. And a resolution having been adopted for amending the Constitution in that particular, the Governor was requested to transmit it to the Legislatures. This was done by Samuel Adams in his executive capacity.

Life of Samuel Adams, t. III, 330, 331.

EXTRACT FROM BIOGRAPHY OF JOHN JAY; BY WILLIAM JAY.

The decision of the Court instantly aroused that morbid sensibility on the subject of State rights which had opposed so many obstacles to the establishment of the federal government.

A general alarm was felt or affected, and the governors of several States brought the subject before their Legislatures, that measures might be taken for averting the danger to which State sovereignty was exposed. But, although the decision was unwelcome, it was not easy to refute the reasons on which it was founded, and the Court seems to have escaped censure. It was not contended that the Court misconstrued the Constitution, but it was insisted that the jurisdiction given by that instrument in the present instance ought to be revoked. At the next session of Congress an amendment to the Constitution was prepared, and afterward ratified, declaring that the judicial power of the Court should not extend to suits against a State by a citizen of another State. However wise and just such a jurisdiction may be in theory, it would certainly have been attended with many inconveniences in practice. Cases would, probably, arise, in which the general government would have wanted either the power or the inclination to enforce the decree; a powerful State might have refused to submit to a judgment which it regarded as derogatory to its honor or welfare; and it is not probable that the other States would have been willing to incur the hazards of a civil war from a disinterested love of justice.

Life of John Jay, t. 1, pp. 297, 298.

REMARKS:

Gouverneur Morris expressed the opinion that the inconveniences to result from attempts to enforce a judgment would be insuperable. He approved of the adoption of the eleventh amendment.

3 Morris' Writings, 266.

The argument in the Federalist becomes more powerful by the circumstances which surround us that serve to illustrate it. "Whoever considers the populousness and strength of the several of these States singly at the present juncture, and looks

forward to what they will become, even at the distance of half a century, will at once dismiss as visionary any scheme which aims at regulating their movements by laws, to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities. A project of this kind is a little less romantic than the monster taming spirit attributed to the fabulous heroes and demigods of antiquity.

Federalist, No. 16, p. 71, 72.

The cases before the Court have been commenced to enforce a contract, and by a judicial decree, to control the future administration of Louisiana as a sovereign. The case presented is the very case which dictated the eleventh amendment, and was designed to be placed outside of judicial power. Suits to enforce demands upon the Treasury of a State, and requiring the use of the power of taxation. The State denies the jurisdiction in the cases of the Syndicate, for that the purpose of the suit is to defeat that amendment. In the words of Lord Coke, "the execution is the life of the suit," and in these cases the executory process is to be employed to make a seizure of money raised by taxation, and deposited in the Treasury. Chief Justice Jay was disposed to exercise a jurisdiction against the United States, and hints this in his opinion in the case of Chisholm, but then he hesitates, and finally concludes he cannot have his execution carried into effect. But he says, against a State, "the Court could call on the national executive for aid." The General Court of Massachusetts, under the inspiring force of her Chief Magistrate, answered that this was "unnecessary and inexpedient—and IN ITS EXERCISE dangerous to the *peace, safety, and independence of the United States, and repugnant* to the first principles of a *federal government.*"

B.

Cohens vs. State of Virginia.

The question decided in this case was, that a writ of Error might issue in a proper case under the 25th section of the Judiciary Act of 1789, although the prosecution was against the defendant by the State for a violation of her laws, the eleventh amendment did not affect the appellate jurisdiction under that section of the Judiciary Act.

Extract from Opinion given in Cohens vs. Virginia, 6 Wheat, 406.

It is a part of our history that at the adoption of the Constitution, all the States were greatly indebted, and the apprehension that these debts might be prosecuted in the Federal Courts formed a very serious objection to that instrument. Suits were instituted, and the Court maintained its jurisdiction. The alarm was general, and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State Legislatures. That its motive was not to maintain the sovereignty of the State from the degradation supposed to attend a compulsory attendance, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State.

The jurisdiction of the Court still extends to these cases. We must ascribe the amendment then to some other cause than the dignity of the State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the

jurisdiction of the Court in these cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is that it was intended for those cases, and those only, in which some demand is made by an individual in the Courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its own convenience in the adjustment of its debts or other claims upon it. But no interest could be felt in so changing the relations between the whole and its parts as to strip the government of the means of protecting by the instrumentality of its Courts from active violation.

REMARKS:

This historical statement is made in a case which came from Virginia, and was argued by counsel appointed by that State. In the Virginia convention there was a debate on the judiciary clause, from which I have quoted, and there was anxiety and apprehension expressed lest the judiciary clause in the Constitution would be construed so as to allow of the suability of a State. Patrick Henry opposed the Constitution, and raised as much of alarm and as many doubts as he could, and had a large support. Madison and Marshall allayed the apprehensions then, and in that convention assured the members. It is to this, we suppose, the Chief Justice alludes. It cannot be affirmed that when Massachusetts resented the writ served on her, or that when Virginia *unanimously* supported the movement of Massachusetts, this was from any morbid fear as debtor States. I assume that their resolutions tell plain truths of the causes of the amendment. The Chief Justice, in 1793, had not been in the Congress or councils of the United States, and the year previously was a member of the State Legislature. Patrick Henry,

during the convention, and for some time after, was implacable. The appeals in the convention often went to the verge of legitimate discussion on the subject of the debts. I suppose this made the impression expressed in this paragraph.

C.

FLETCHER VS. PECK, 6 CRANCH, 87–148.

I have examined the decisions that have been made in this Court in which the limits of the judicial power have been most nearly approached in cases wherein the States or their officers have been concerned as parties, on the record or in interest. This case is anomalous, difficult to appreciate or explain, and was but an *incident* occurring in the complicated, acrimonious and protracted controversy, finally settled by an act of Congress, approved 31st March, 1814, 3 Stats. at Large, ch. 39, p. 116, with scarcely a reference to the judgment in this case, or to the opinion of this Court. The controversy originated in a sale, by the Governor of Georgia, 7th January, 1795, under the authority of a legislative act passed a few days before, of the western Territory of Georgia, to four land companies, for the sum of $500,000. The deed conveyed all the lands within the present States of Alabama and Mississippi north of the 31st degree of north latitude, the southern boundary of Georgia and the United States. An investigation afterwards made by James Madison, Albert Gallatin, and Levi Lincoln, members of the Cabinet, and report of testimony under authority of Congress, demonstrates that the legislative act was obtained by the bribery of every voter for the act in the Legislature, except one. The succeeding Legislature impelled by an irresistible torrent of popular indignation, passed a rescinding act the 13th February, 1796, directing the money to be returned; the act in the archives to be burnt by the sheriff before the State House in presence of

the Legislature and spectators; the journals to be expunged of notices of it; that Courts should not hear it, lawyers plead of it; clerks record any title under it, juries render any verdict, &c., &c. The sum of $310,695.15, was refunded to releasing purchasers. Others hurried northward and sold their titles to New England, New York, and European purchasers, prior to the 13th February, 1796. One sale bears date that day. In the future controversy these claimed to be *bona fide* purchasers, without notice of anything to awaken suspicion or notice either of fraud or the popular fury.

1 American State Papers, Public Lands, No. 74, pp. 132, 152, 159.

President Washington communicated the sale to Congress as a grave circumstance. In 1798, Congress erected a territorial government over this domain, as if the State of Georgia had transferred sovereignty and jurisdiction. In Congress acts were passed directing an investigation of all the facts, and a report upon their legal effect. That report caused the passage of an act for the commissioners to obtain the title of Georgia. On the 24th April, 1802, Madison, Gallatin, and Lincoln, signed for the United States the articles of cession by Georgia; also signed by Abraham Baldwin, James Jackson, and John Milledge, for Georgia. In these articles the same western territory was transferred to the United States, and one of them appropriates not to exceed 5,000,000 of acres to satisfy, quiet, and compensate all claims on the territory conveyed.

1 American State Papers, Public Lands, No. 69, p. 125.

In the early part of 1803, a committee of the New England claimants took notice of this agreement, approved its conditions, and suggested modes of appropriation of the appropriated land. The names of Perez Morton, John Peck, and others, are signed to this. State Papers, supra, 159. In March, 1803, a statute was passed for occupancy, survey, and sale of lands;

and for the examination of the claims upon any portion of the territory, and the same commissioners, Madison, Gallatin, and Lincoln, were retained—2 Stats. at Large, Ch. 27, p. 229; 1 Clarke, Land Laws, 646, 662, 673, 686—with the concurrence of the claimants. State Papers, supra, 157. These commissioners made their report to the 9th Congress, 1805–1806. In anticipation of the report of the claims of the claimants, a committee of the claimants in November, 1804, enforced the expediency and propriety of the settlement proposed by the commissioners under the compact of 1802, and recommended by them. They state as a motive what is contained in this extract. The memorial to Congress is signed, Perez Morton, and Gideon Granger.

"If it should be said that we may pursue our rights at law without the interposition of Congress, we answer that to contend with the government of their country, is not only unpleasant to the feelings of very many of the claimants, but they are ready to acknowledge might be deeply injurious in its consequences; for, although under some of the monarchies of Europe their humble subjects are indulged with 'the petition of right,' under which by the decrees of their Judges in Chancery the hands of their sovereign, may be removed from the possession of the land of their subjects, yet for the citizens of the American Republic no such right is recognized. If, therefore, from motives of policy the government of the United States shall see fit to hold these lands unalienated for a century to come, the claimants during that period must remain without remedy. They could recover possession by judgment of law only, lot by lot, as the government may see fit to dispose of them."

1 American State Papers, supra, 209.

The bill prepared upon the report passed the Senate. It encountered a violent opposition, and was productive of exasperating debate. Mr. Randolph before this the leader of the administration party, abandoned his position, and displayed his capacity

for fierce and pungent denunciation. The bill was rejected in March, 1806, by the House of Representatives.

Annals of 9th Congress, pp. 909, 919.

The subject remained before Congress without a decision until the 13th Congress, with occasional discussions. In 1814, the bill was again reported, and was passed in the Senate. In the House of Representatives, Mr. Oakley, of New York, was chairman of the committee of claims, and made a favorable report, recommending the bill as proper upon grounds of public policy, and a concession to the equitable character of the title of the claimants. This opinion, the report said, does not rest upon the strict legal title of the claimants to the lands in question, though the committee cannot forbear remarking that the title appears to have all the sanction which can be derived from a solemn decision of the highest tribunal known to the country. This is the only allusion to the decision rendered in this Court in the report. The bill after much discussion was carried 84 to 76. Among the ayes are, Oakley, Lowndes, Gaston, Breckenridge, Ward of Massachusetts, Webster; among the nays were, Macon, Calhoun, Forsyth, J. McLean, (Ohio), Ingersoll, Grundy, R. M. Johnson. The Act appropriated $5,000,000 of land scrip, receivable in the Mississippi land offices for land, to be distributed among the claimants according to their claims. It was to be, and was a final settlement. No claim was thereafter receivable, either for pleading or for evidence in any Court of the United States, adversely to a right derived from the United States.

2 American State Papers, Public Lands, No. 222, p. 877, No. 223.

Annals 13th Congress, 1896, 1919, 1924.

A criticism on Fletcher vs. Peck occurred in the debate. "That it was a feigned issue between Fletcher and Peck, with the aid of counsel, for the purpose of getting a judgment against Fletcher, the plaintiff. If Fletcher had gained, their

chance for the 50,000,000 acres of land would have been lost. Notwithstanding the great zeal of plaintiffs to gain their suits, they are often disappointed; but never did I hear of one who wished to lose his suit, but he was in some manner accommodated. I never did see a Judge with ingenuity and talents enough to overcome and defeat both parties and their attorneys, and award a judgment to the plaintiff contrary to their united efforts." Peck and his counsel in the Circuit Court, Perez Morton, appear conspicuously in the proceedings, and signed memorials in 1803, and 1814, for a settlement. Fletcher, a brother-in-law of Peck, never appears at all—from 1803 to 1814. Mr. Harper appears as an original member of the Georgia land company in January, 1795—before the deed was made. The deed in which the covenants appear, was executed in May, 1803, a few weeks after the act of March, 1803, in which the proof of claims was allowed to be made. The suit before the Court was commenced in June, 1807, in the Circuit Court at Boston, and the judgment rendered in October, 1807, and filed in this Court in January, 1808. The judgment was rendered in 1810. The case at the time rested under suspicion as expressed by Justice Johnson in his opinion at that time. This was felt in 1814.

EXTRACT TAKEN FROM THE OPINION IN FLETCHER VS. PECK.
6 CRANCH, 87–148.

"The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a *principle originally engrafted* in that instrument, *though no longer a part of it.* The Constitution as passed gave the Courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the Courts of the United States for that violation. Would it have been a defence in such a suit to say that the State had passed a law absolving itself

from such a contract? It is scarcely conceivable that such a defence could be made. And yet if a State is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. *This* feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated."

6 Cranch, 139.

In 1810, when this opinion was delivered, the United States had been, since April, 1802, in possession of this vast domain, and in March, 1803, Congress had legislated, claiming every right as sovereign and proprietor over every acre of it. On a deed purporting to be framed subsequently to this possession, this proprietary right of the United States to every one of these fifty millions of acres, upon demurrers and rulings, one arranged in this Court, was called in question, and decided adversely without any representative of the United States being present. Georgia had ceased to be a claimant since April, 1802. There were none to respond to any adverse claimant but the United States. The subject had been under the direction of three statesmen of eminence, members of the executive government, and acting under Congress, as an administrative question of extraordinary magnitude and interest. Congress, under the Constitution, which gives power to make the needful rules and regulations, had legislated and finally did, in the manner set forth in the compact of 1802, *satisfy*, *compensate* adverse claimants, and quieted the title to their own content, as shown in the State papers. It illustrates the argument we have made as to the necessity of leaving a vast number of such questions in such hands.

The paragraph I have cited I interpret to mean this and no more: That at one time the Constitution gave the power to the Supreme Court of the United States to receive suits and to judge them, brought by individuals against the States.

In that period the States would answer as civil corporations, and that her will, by means of a legislative or any other Act, would not have been an absolution from the performance of her contracts before the Court. The author states that the feature of the Constitution he alludes to no longer appeared in the Constitution. Certainly we have no precedent to aid us as to what the Court would have done in the case supposed. But the fact is, that not an acre of all the domain described in the deed made by the Governor of Georgia, on the seventh of January, 1795, under the Act of the Legislature passed on the first day of that year, has been held for one hour under that deed. All titles are derived from the United States by reason of the title acquired in April, 1802, from Georgia.

The only memorial of that Act is found in the Constitution of Georgia, made in 1798, which requires every title to an Act to state the object. The title of the Act of the first of January was shamefully deceptive.

D.

Acts No. 3 and No. 4 of Louisiana.

I.

The seventh section of Act No. 3 and the article one of No. 4 referred to in the bill, provides for the collection of a special tax of a fixed rate, annually, until the principal and interest of the issue of bonds be paid. The bonds become due in A. D. 1914. The Auditor and Treasurer and Board of Liquidation were required to collect these taxes without more legislation and to apply them for the purpose designated. In 1879, by the debt ordinance these were repealed and other arrangements were substituted. The claim here is that the law remains operative as a contract.

It can hardly be imagined that there is any other designation for it in any connection with the Constitution of the United States,

or in a Court of the United States. The inquiry has been made as the power of the Court to deal with it as a contract.

II.

Montesquieu in a chapter which has impressed the Constitutions of the United States, Federal and State, says there can be no liberty where the power of taxation is deposited with the executive department. It is in peril, he says, if the Legislature imposes taxes for long periods or irrevocably, instead of from year to year as occasion demands. That the refusal to convene the Legislature, or when the sessions are uncertain or irregular or at distant periods involve the same dangers. The same opinions are expressed by Parsons in a writing published with his memoirs.

Montesquieu, Esprit des Lois., Liv. XI, ch. VI.
Memoir of Parsons: Essex Result, p. 373.

The Constitutions of the United States provide for regular sessions of Congress and Legislatures; that money bills must originate with the popular branch and that no money shall be drawn which has not been appropriated. The word "contract" in the American Constitution is assumed to have the same force and extension as *spiritalis potestas* in the Papal Constitution, and to confer *summam potestatem de temporalibus rebus.* The fundamental principles of organic law, and of State administration are to be overturned, and the marshals, receivers and deputies of the Courts, are to be placed in the control of the revenue and to be independent of all except a Master in Chancery. The answer to be made is, that this was settled in this Court before the century commenced.

The case of Chisholm vs. Georgia was a suit for a money demand. The Court rendered a judgment by default and allowed a writ of inquiry. The writ was not sued out or executed. "This cause and all the other suits against States were swept at once from the records of the Court by the amend-

of the Constitution."—2 Dallas, 480. There were suits for land as well as suits for the performance of contracts that were cast forth from the Court. Chief Justice Marshall in Ogden vs. Saunders, adverting to this subject, says: "To afford a remedy is certainly a high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to just reproach of the world. But the Constitution has not undertaken to enforce its performance. It prohibits the States from passing any law impairing the obligation of contracts, it does not enjoin them to enforce them." This plain question was submitted to the Supreme Court and sovereign authority in the Union after the decision of the Court on the motion made in the case of Chisholm: Shall the tribunals of the United States have power to enforce against the States their contracts or claims on their property?

The answer is recorded as a part of the supreme law of the land. No State in the Union, nor perhaps citizen would have contemplated but with amazement and dismay, a constitution that under interlocutory orders the State Treasury could be controlled by writs of mandamus and of injunction and that warrants were to be made by subordinate officers of a Court of first instance. This is the aim in these proceedings.

E.

Lord Hammond's Dispatch, 26 April, 1871.

Her Majesty's government are in no way party to private loan transactions with foreign States. Contracts of this nature rest only between the party borrowing and the capitalists who enter into them as speculative enterprises, and who are content to undertake extraordinary risks in the hope of large contingent profits. Further, it is scarcely necessary to point out the endless troubles which would arise if the active intervention of

England were exerted to redress the grievances of bondholders. Independently of the expense which would be necessarily incurred, and the risk of international complaints, forcible measures if adapted towards small States, which for the most part are the ones complained of, would subject this country to grievous imputations. For such and other reasons, her Majesty's government have determined as a matter of wise policy, to abstain from taking up as an international questions the complaints of British subjects against foreign States which fail to make good their engagements in regard to such pecuniary transactions, or to interpose, except by good offices between bondholders and the States by which they have been wronged.

Turkish Loans, 225 Hansard Deb., 202.

F.

National Bankruptcies; Adulterate Coin and Currency.

I.

At the end of the 1st Punic war the coin had been debased to one-sixth of the weight it had at the beginning of the war. The coin As weighed a full pound at the beginning of the war, and was reduced to two ounces. In the second war all moneys of minors, unmarried women, and trust moneys, were taken and paid for with bills. These were actually a paper currency.

2 Arnold's History of Rome, 177–8, 351.

England.

The Jews, like the forests, were the special property of the King, and as property worthy of careful cultivation, they were exempted from general taxation to be tallaged by the King. Henry III assigned the whole body of the Jews as security for a loan.

2 Stubbs' Cons. His., 530, 531.

Henry VIII loaded the people with oppressive taxes, and he pillaged them by loans which it was known he never meant to pay. The Parliament authorized his oppressive taxes, and absolved him from the payment of his debts.

1 Russell, Mod. Europe, p. 394.

In France, under the monarchy, the livre was successively debased so as to be but one 87th part of what it contained of silver under Charlemagne. The falsification of money continued till within the reign of Louis XV. In Great Britain there was less of this than elsewhere. That the fall there has been only to the third of its original value, and since the time of Elizabeth there has been no alteration of the coin. In the year 1797, the suspension of specie payments of the Bank of England was authorized. The bills were a legal tender during the period of twenty-two years.

Ramel's liquidation in France took place by decree of 30th September, 1797.

The inscriptions on the book of the public debt were reduced to one-third of their amount. Two-thirds of the debt was paid in bills receivable in payment of purchases of public domain. These were sold at a discount of 80 per cent. on their issue, and soon became worthless.

Louis upon his ascension to the throne of Holland, repeated Ramel's liquidation—that is he erased two-thirds of the debt.

Upon the restoration of William I, he assumed to pay the principal, without interest, past or future, of the debt reassumed and reduced interest to 2½ per cent. annually on the public debt.

The Austrian settlements were still more to the disadvantage of the creditor. The depreciation of paper money was as 1 to 12. In Russia 1 to 4.

In my briefs I have referred to the financial arrangements of the United States.

The necessity for a public declaration of bankruptcy has, as we have seen, been frequent. The remedies for such a condition

must necessarily appear violent. But if the disease be exhausting, and there be no cure but by an interference with the public contracts, this must take place or the commonwealth must perish. When this severe and painful remedy is administered, public indignation should turn upon those who brought the State into it, not against those on whom is thrown the burden, to deliver the State from it. There will be complaints and there will be suffering, as there must be whenever a State is exposed to a great calamity.

The greatest din has always come from stock jobbers and usurers, who roar aloud until some Nehemiah becomes very angry when he heard the cry and their words. Then he says: I consulted with myself, and I rebuked the nobles and the rulers, and said unto them, Ye exact usury, every one of his brethren; and I set a great assembly against them.

Bolingbroke says to a similar class in his time what seems to be applicable to this one: "Let these men learn, therefore, to submit, and to reason, as old Bateman did when the reduction of interest was agreed to in the year 1717. He told my Lord Stanhope he was glad this resolution had been taken, because, though his interest was diminished, he should think his principal more secure than ever."

C.

WILLIAM VASSAL, *Complainant,*
vs.
THE COMMONWEALTH OF MASSACHUSETTS, *Defendant.*
} IN EQUITY.

[SEAL.]

The President of the United States, To John Hancock, Esquire, Governor, and James Sullivan, Esquire, Attorney General of the Commonwealth of Massachusetts.

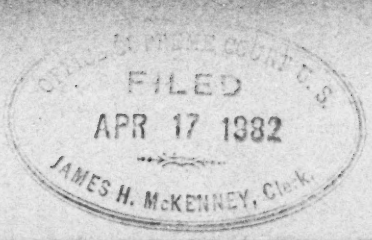
GREETING.

For certain causes offered before the Supreme Court of the United States holding Pleas in Equity, we command and strictly enjoin you that laying all other matters aside and notwithstanding any excuse you be and appear on behalf of the Commonwealth of Massachusetts before the said Supreme Court of the United States, holding Pleas in Equity on the fifth day of August next ensuing, at the City of Philadelphia being the Seat of Government, to answer concerning those things which shall be then and there objected to the said Commonwealth and do further and receive on behalf of the said Commonwealth what the said Court shall have considered in this behalf. And this you may in no wise omit under the Penalty of four hundred Dollars.

Witness the honorable John Jay Esquire Chief Justice of the Supreme Court of the United States at Philadelphia, the Eleventh Day of February in the Year of Our Lord one thousand seven hundred and ninety three and of the American Independence the Seventeenth.

SAM BAYARD, *Clk*
of ye Sup: Court of the U. States.

108-76



Supreme Court of the U. S.

17th April, 1882.

THE STATE OF NEW HAMPSHIRE, No. 4,
THE STATE OF NEW YORK, No. 6,
JOHN ELLIOTT, ET AL, 2 *Cases*, 845, 856,

vs.

THE STATE OF LOUISIANA AND HER EXECUTIVE OFFICERS.

THE ANSWER MADE TO THE POINTS FILED THE 11TH OF APRIL, 1882, BY THESE SEVERAL PLAINTIFFS, ON BEHALF OF THE DEFENDANTS IN THE SUITS AFORESAID.

JOHN A. CAMPBELL,
Attorney for Defendants.

Murphy & Co. Printers & Stationers, 182 Baltimore street, Baltimore

ministers, and those in which a State shall be a party. We are informed that it was supposed by many persons that the United States might sue in the Supreme Court; and in one case they did so. This opinion was discarded, and the contrary opinion became established. The only point for decision and the only point decided in Marbury vs. Madison, 1 Cranch, 137, was that Congress could not enlarge the original jurisdiction of the Court, and the explanatory and official note of Chief Justice Taney to Yale vs. Todd, in the case of U. S. vs. Ferrera, 13 How., p. 52, explains the state of opinion and of doctrine. This was that the original jurisdiction is defined, and cannot be enlarged by Congress.

III.

New Hampshire and New York, by separate legislative Acts, have respectively invited their citizens to transfer to the State such bonds or written agreements as they may have of other States of the union which have not been paid, and to secure the State from outlays of money under any and all conditions; and thereupon, that the State would maintain a suit in this Court for the recovery of the sum due. The assignors of certain coupons which the State claims to own under acceptance of this overture by the owners, are the only parties having an interest in this suit.

The answers of the defendants to the bills of the States above named, affirm that the controversy thus invited is a fictitious and a simulated controversy imposed upon this Court contrary to the order, rule, and authority of this Court. This averment will now be justified.

IV.

This Court is composed of Judges nominated and confirmed to hold their judicial office during their good behavior as a public trust. The Roman magistrate might delegate his authority—"*Quaecumque jura magistratus jure competunt mandari possunt.*"

The French magistrate, before the revolution, purchased his office —Montesquieu bought his presidency. So did Moupeau, who never for a day had the confidence of the country.

But the Judges of the Supreme Court cannot delegate their original jurisdiction nor exercise any original jurisdiction which has not been delegated to them by the people of the United States in their fundamental and organic law—the Constitution of the United States. No other authority than that which can alter the Constitution can alter or disturb this jurisdiction. No consent of parties, nor simulations, nor fictions, nor contrivances of parties, can confer a power beyond that granted by those who ordained the Constitution. On the 28th of August, 1787, in the convention that framed the Constitution, it was moved and seconded that "in cases in which the United States shall be a party, the jurisdiction (of Supreme Court) shall be original or appellate, as the legislation may direct." The words "original or" were stricken out, and then the amendment was defeated. So the United States may not come into this Court as a plaintiff; nor can any citizen of the United States.

V.

The only plaintiff that can obtain a citation to a State of the Union is a sister State. I reject as a mere chimera the suggestion that a foreign State could come without a double consent—that of the United States and the State defendant. No State could sue a foreign State without the consent of that State and of the United States. Nor is there any universal power given to a State to sue another State. The CONTROVERSY must be confined to [redacted] States. It must be BETWEEN States.

VI.

The States of New Hampshire and of New York say they have a right of action or suit as owner, holder or bearer of certain bonds which, they say, Louisiana issued, and that certain coupons of in-

Barney vs. Baltimore, 6 Wall., 280.
Cleveland vs. Chamberlaine, 2 Bl., 426.
Williams vs. Nottawa, 102 U. S., 256.
Osconogon vs. Arms Co., 103 U. S., 261.

The argument of the plaintiffs seems to be fully set forth and answered in the case of Pryse vs. Pryse. The Court said "that where a new jurisdiction is given by statute the Court cannot go beyond it on grounds of convenience. And whereas, as in the statute in question, the obvious intention is merely to simplify for certain purposes the power of a Court of recognized jurisdiction, it can hardly be right for that Court to twist the Act into an instrument for claiming a more extended jurisdiction properly belonging to another. Still the authorities seem to show that within certain limits the Court may be *ingenious* in seeking to give itself jurisdiction under this Act when the principal question is one which it can deal with. And I am asked to apply some similar process for the purpose of acquiring jurisdiction by a side-wind over questions I have no right to decide directly."

L. Rep., 15, Eq., 31–32.

The invitation to the Court to entertain jurisdiction in this case are not less extraordinary than the terms of the Acts inviting assignments of securities, to enable the plaintiffs to extend the invitations to the Court.

X.

The case of Osborn vs. Bank of U. S., sustains no principle to justify this suit. The defendants were the principals in seizing and holding the property of the bank. They justified their seizure by pleading a license which had no validity, and personally they were required to restore the property they had unlawfully seized and possessed. This they did without demur of any sort after the decree was made. They had been enjoined from meddling with

the property before the seizure of which they had notice and served before they had parted with it with a specific injunction.

The case of Davis vs. Gray, was that of a Receiver possessed by a decree of a land grant in a pending suit. There were outstanding warrants which might be laid upon it, and thus to encumber the title. The Court did not know who held these warrants, and to protect the estate, enjoined the officers who had the power to locate the warrants. The case assumes that the State had parted with the title, and had no interest in the property. The holders of the warrants could not be affected by the decree in their title nor the State. The object was to preserve the property in the Court from depreciation until a sale could be made, and a responsible owner of the land grant, obtained.

The case of McComb was that of a holder of certain bonds of the State, in the possession of a board of liquidation for use in settling a class of debts. He claimed that another creditor of a different class should not be paid in those bonds, upon more favorable conditions than his class.

In neither one of these cases have the Supreme Court been *ingenious* to bring the State as a party before them contrary to the Constitution of the United States, nor do we discover the side wind whereby this was accomplished in these cases.

XI.

The fact is manifest that the treasurer, Burke, and the auditor, Jumel, have not in their custody or control a dollar, except under the special orders of the State, and without authority from other sources. Nor has any money in the treasury been in the possession or control of the claimants, nor does any one pretend he can identify as his own any portion of it. All of the questions of an expenditure or disbursement of any part requires the action of the State itself. The purpose of this suit is to assert there exists another authority than the State in which is vested that sov-

ereignty which heretofore has been conceded to belong to it, of adjusting her accounts for herself. The cases we have cited show that no such power exists.

20 Howard, 527, 531–2.
Twycross vs. Dreyfus, 5 L. R., Ch. D., 605.
Madrazo, 7 Pet., 627.
6 Price's Exch., 411–480.
1 Vesey Sr., 446.
3 Y. & C. Ex., 342.
Troy R. Co. vs. Commonwealth, 127 Mass., 43.

These cases show that the title of a State to her property or money cannot be divested by the judicial action of her Courts, even though she be a trustee for the claimant, and under an obligation to convey.

XII.

The object of the Constitution was that the States should be independent and equal. That there should be no opportunity for contradictions and controversies among them.

The prohibitions in the Constitution were made that occasions for controversy should never arise. The commerce among the inhabitants is subject to regulation by the federal government. The principal instruments and means of commerce, such as ships and seamen, the fixing of values of coins, and the weights and measures; the laws of bankruptcy, invention and copyright, are subject to the federal government. The conclusion is inevitable that the States cannot use this Court to abet the suits of any citizen of the United States against the State.

XIII.

The comment on the opinion of the Supreme Court of Louisiana is not justified. There is nothing in the opinion or judgment that is not in harmony with the Constitution and the laws of the State. The marvel is, that any one should take the responsibility of

bringing a suit involving such questions, or of litigating in the face of an established and settled constitutional law. Without an authority from the Legislature, no suit can be instituted against the State, nor money drawn from its treasury. The departments of the State are separate and independent, and the Constitution peremptorily exacts of each to confine itself to the limits prescribed, and declares that any Act violating this injunction shall be null and void.

XIV.

If the propositions of the plaintiffs Elliott, Gwynn and Walker be true that the moneys of the State in the treasury of the State, be subject to the operation of the writs of the Court, and that the officers are amenable to the orders of the Courts, the question arises, why do not these parties, and others situated like them, employ their legal remedies? why have they adopted so many versute methods to embarrass the course of judicial proceedings?

It is the settled law of this Court that the Court of Chancery will not enforce the collection of taxes, nor the administration of public offices, State or federal. If New Hampshire or New York have coupons as they aver, why not bring their actions at law to establish their claim. What need for Elliott, Gwynn and Walker to file their bill to establish their debt?

Heine vs. Levee Com., 19 Wall., 655–117.
Levee Com. vs. Barkley, 3 Otto, 258.
Attorney Gen. vs. Salem, 103 Mass., 138, 140.
Drewry vs. Barnes, 3 Russell Ch. R., 94.
Moore vs. Smedly, 6 John. Ch. R., 28.
Kilbourne vs. St. John, 59 N. Y., 21.

XV.

The cause No. 845 of Louisiana on the relation of Elliott is a curious specimen of the tentative processes used by the syndicate

Elliott, Gwynn and Walker, to engross and manipulate the bonds, coupons and suit.

The first suit commenced by them is No. 856, in the Circuit Court of the United States, on the 16th January, 1880, which followed close upon a suit commenced by them previously in that Court, in November, 1879. Then their suit of New Hampshire in this Court the 26th January, 1880. The third suit is No. 845, now pending in this Court and under argument.

This suit was commenced in one of the District Courts of New Orleans. The object of the suit is to obtain a mandamus directed to the Treasurer and the Auditor and Board of Liquidation to pay out the moneys that had been collected, and to assess and to collect such as were provided for by the Acts of 1874, specified in the pleadings in all of the suits, now before this Court among these parties. Any person acquainted with the Constitution and laws of Louisiana and the frame of its government, must have known full well that it was a petition that could not be granted. As the Supreme Court said with entire propriety, in the case of Hart vs. Burke, 33 Ann., 500, there was no Court in the State competent to make such an order as was prayed for. Nor have we found any precedent for the overbearing demands of these parties in any Court of the country. But the petitioner did not go to the District Court to stay there.

On the face of the papers their citizenship in New York appears. It was perfectly easy for them to have applied at once to the Circuit Court. They had filed two bills in that Court at different time within a few months. But in a short time they asked for a removal of the application for a mandamus to the Circuit Court of the United States.

But, as the State District Court had no jurisdiction to send a mandamus in such a case, neither could the Circuit Court send a mandamus except as an auxiliary writ, to enforce an existing judgment. The institution of a suit at law upon the coupons overdue is the only thing these parties have not done in the way of litigation.

Kendall vs. United States, 12 P., 584.
Secretary vs. McGarahan, 9 Wall., 311.
Bath Co. vs. Amy, 13 Wall., 244.

So this mandamus suit was commenced in a State Court with no jurisdiction to allow the prayer of the petition, terminates in a Court that cannot issue the writ.

XVI.

I shall submit to the Court the printed reports of the opinion delivered in the last experiment in the Courts at New Orleans to obtain from some Court some order to do what it is not competent for any judicial power in the country to do.

XVII.

Particular to the New York Case.

None of the processes for making side-winds whereby a jurisdiction denied by the supreme law of the land might be blown upon the Court is quite so curious as those we are proposing to deal with in this section of the answer.

Two persons united to transfer to New York their ten bonds—on which there were thirty coupons not paid. The names to the transfer to the State of New York are Goodnow and Graham—not Elliott, Gwynn, Walker, nor Vanderbilt, Astor, Gould. The gracious invitation of New York has had no other response than this of Goodnow and Graham.

What we have said sufficiently deals with the case. In answer to the cross-bill, New York by her Governor and Attorney General say under oath that New York owns, holds and bears these bonds.

When they come to answer the interrogatories specially addressed, it appears that these two persons placed their affairs in

the hands of their counsellors. They caused a transfer to be made to the State; they proposed a bond to hold the State harmless from every expense of any sort; they wrote the bill filed in this Court, and they procured the assent and signature of the Attorney General of New York, and they filed the bill in this Court. New York pays and promises nothing; New York expects nothing from the suit; New York tells this Court under her Seal of State that she owns, holds and bears these bonds, and that she has a controversy with Louisiana for the sum of these thirty coupons under the Constitution of the United States.

The Court will find in the answer and the cross-bill our impeachment of the law and the fact that New York propounds to the Court.

XVIII.

New York in this bill puts forward still another case. She says that besides the case of Goodnow and Graham she has other citizens who have not accepted the benevolent provisions of her gracious laws, and so she proceeds because of the pleasure that beneficence affords. Virtue is its own reward.

The prayer of the bill is, that all of these unconscious subjects of the consideration of the *parens patriae* may be taken as wards of this Court, and that the Court shall superintend the assessment, collection and distribution of the annual interest and the principal due in the year 1914, when the bonds become due. (Record, p. 6, fo. 12.)

The facts to sustain the claim of New York are established by witnesses. Rappallo bought bonds in 1877, and bought in 1879. Rappallo testifies he is desirous to have payment through the intervention of New York. Sherman is a cashier, and his bank took some bonds in payment of a debt. Jessop is a member of the Stock Exchange and has bonds, and saw Goodnow & Graham assign their ten to New York.

The argument to sustain the claim is supported with erudition. The argument is, were New York an independent nation she would have a clear right to compel Louisiana to pay these coupons of interest, and to secure these bonds so that her citizens aforesaid should be able to obtain all the profits they expected therefrom. New York being restrained by constitution and laws from coercing Louisiana in a military way, asks of this Court to do it in a civil way. She has surrendered her faculties for reprisals to the United States, in trust, to be exerted through her suit in this Court.

Reprisals in the sense now employed, originated in an epoch of disorder and barbarism; we find no name of the sort in the ancient history. It was the offspring of the title to carry on private war, and when the favorite judicial process was a judicial combat. Laws had no potency, and force was triumphant in the period of universal disorders and when there was a dissolution of society. Reprisal was a remedial process, for a person pillaged and rabbled in another State, which the magistrate of his own State issued to him, authorizing to pillage and rabble any person in that State for indemnity. It was a license for private war, and increased disorder and anarchy. The first approaches of order were observed in the repression of reprisals.

In the year 1195, Ferrara made a treaty with Brescia. If a citizen of Ferrara contracted with a citizen of Brescia, it was stipulated that these should not harrass nor distress the merchants of either city, for that they had no claim except against the debtor. It is for the creditor to look out with whom he makes his contract. In the customs of Hamburg, a similar cause is assigned for abolishing reprisals. The resort to them is condemned by the writers of International law on the continent. Powerful States have oppressed and overborne feebler States under color of the savage custom. Lord Palmerston aroused the indignation of Europe, by his insolent and overbearing conduct to Greece.

The Emperor Nicholas of Russia, told him so with the full approbation of Europe.

2 Calvo, Droit Int., secs. 1568–1582.
W. E. Hall, Int. Law, p. 236.

The exactions from France, in 1815, by Great Britain, in respect to the depreciation of assignats in the hands of British holders, was condemned by our Gallatin as a flagrant act of wrong and injustice. The circular of Lord Palmerston is without authority, or respect in the British Parliament itself, or the merchants of Great Britain.

Report of Committee on Loans, July, 1875.
2 Writings of Gallatin, 490–494.

JOHN A. CAMPBELL,
Attorney for Defendants.

108-76

OFFICE SUPREME COURT U.S.
FILED
OCT 10 1882
JAMES H. McKENNEY, CLERK

UNITED STATES SUPREME COURT.

THE STATE OF NEW HAMPSHIRE *against* THE STATE OF LOUISIANA AND OTHERS.	No. 2. Original.
THE STATE OF LOUISIANA EX REL. JOHN ELLIOTT ET AL., *Plaintiffs in Error,* *against* ALLEN JUMEL, AUDITOR OF THE STATE OF LOUISIANA, ET AL., *Defendants in Error.*	No. 845. Mandamus.
JOHN ELLIOTT AND OTHERS, *Appellants,* *against* LOUIS A. WILTZ, GOVERNOR, &C., AND OTHERS, *Appellees.*	No. 856. Injunction.

ARGUMENT OF WHEELER H. PECKHAM.

1

SUPREME COURT OF THE UNITED STATES,

APRIL 18TH AND 19TH, 1882.

ARGUMENT

2

OF

WHEELER H. PECKHAM.

[* * * Denote Stenographer failed to report.]

MR. PECKHAM: *May it please the Court*—The bill that is filed is primarily and directly against certain individuals holding offices under the law of the State of Louisiana, and which officers the bill alleges propose and intend to divert a fund levied and raised 3
under the law of Louisiana, and appropriated by the law and the constitution of Louisiana for the payment of the bonds. The purpose of the bill is to restrain that diversion of the fund, under and pursuant to the law of Louisiana itself. The State of Louisiana is made a party to that bill, not because there is any direct judgment asked against the State of Louisiana, but because in other similar cases this Court has sustained a bill filed against individuals for the purpose of restraining their action as not 4
authorized by law. In those cases, to the objection that the State was not made a party, this Court say: "You could not make the State a party; that would oust you. Therefore, we will maintain the bill without the State being a party." But the State in those cases was the real party interested. It was her law and her policy that were in controversy. When we come to this Court and file an original bill to that objection, what could be said? Why, the constitution provides that in a case in this Court, of which

this Court has original jurisdiction, a State may be a party, and because of that fact, and because the State is principally interested in this controversy, and because it may be brought before the bar of this Court, we have brought her here, not asking relief directly against her, but asking relief against her officers, under her law, permitting her to be heard if she chooses. We have this controversy with these agents, whether they should perform this law that the State of Louisiana has directed them to perform.

We do not act upon laws outside of the State. But I am not inclined in any way to avoid the question as to whether the State of New Hampshire can maintain this suit against the State of Louisiana. All I am speaking of here now is, this case presents itself in the aspect of this plaintiff—laying aside the question of how this plaintiff stands—asking just the relief that has been granted in this Court, and in all Courts, in requiring State officers or United States officers to perform special duties imposed upon them by law. That is the aspect of the case that we present. It does not bring up simply the right of recovery against the State, and bring the two States here in juxtaposition——

JUDGE * * * * : Do I understand you that you got the relief in the Court below, or was not the judgment there against you, and are you not here on writ of error?

MR. PECKHAM: We are here on writ of error.

JUDGE * * * * : Specify the relief asked for.

MR. PECKHAM: The specific relief we ask in this New Hampshire case is that they shall be restrained from diverting this fund.

JUDGE * * * * : What is it in the other case?

MR. PECKHAM: One is of a similar character, for an injunction; and the other——

JUDGE * * * * :

MR. PECKHAM: Notwithstanding that we are asking relief, not of a character that has not been granted by this Court, but of a character that has con-

stantly and always been granted, still there does 9
arise in the case of the State of New Hampshire this question: whether the State of New Hampshire can absolutely by itself own bonds so as to give it a right to come into this Court or any Court—whether the State of New Hampshire can acquire an ownership that enables it to come into this Court and ask that these officers shall perform the duties imposed upon them, or whether if it is disabled from asking any relief, the Court will enable it to ask in a representative capacity for relief That question arises. 10

JUDGE : Does the New Hampshire case allege that the State is the actual owner of the bonds?

MR. PECKHAM: There is no question of that kind in the case. The answer alleges that the ownership, if any, is under the law of the State of New Hampshire, and by stipulation we agree that the State owns these bonds pursuant to that law of the State of New Hampshire.

Now, as the cases are to be argued together, I 11
want to state to your Honors the aspect of the other two cases. One of them was a bill filed by the plaintiffs below, of the same general character as that I have described now as the bill filed by the State of New Hampshire. It is a bill filed by the owners of these bonds to enjoin the diversion of the fund in the hands of these defendants from the purpose to which it was appropriated by that law, to wit: the payment of the coupons falling due on the 6th of June, 1880, to the general purposes of the 12
State government. That bill was dismissed below, and we brought it up here on appeal. The other case is a case where the same parties applied to the State Court for a writ of mandamus to compel the State officers to appropriate this money to the payment of these coupons. That case was almost immediately removed under the removal act to the Circuit Court of the United States, and there tried on the merits. That Court decided that the mandamus should not issue, and a writ of

13 error was taken to this Court. In both cases the pleas were substantially to the jurisdiction alone. In one of the cases there was a denial; and the finding of facts by the Court is identical, word for word, in the two cases.

Now, there has been considerable action in the Louisiana courts upon these matters, both Federal and State, and in order that the Court may have the whole matter before them at once I will state what that is. Mr. Justice Billings held the Circuit
14 Court when these cases were first brought in it, and decided these two cases that are brought here. There was then an action brought by a man by the name of Newman, in the State Court of Louisiana. Newman had claims of a general character (not these bonds), and he asked the State Court for a mandamus to compel the officers having charge of these funds to pay him his claim out of these funds, thus making the diversion. In that suit of Newman we intervened in the name of John Elliott and others.
15 I refer to the case simply to give your Honors all the action of the Court below. Upon that intervention our claim was sustained by the District Court of Louisiana, and Newman's claim was refused upon the ground that this new law, or constitution, of Louisiana was unconstitutional.

We went to the Supreme Court of Louisiana, and that Court has very recently reversed the holding of the lower State Court, and has awarded a mandamus in favor of this man Newman to pay
16 his claim out of this sum, these moneys that are appropriated under this law. Now, in addition to that, there has recently been filed in the Circuit Court of the United States for Louisiana a bill similar to that which is now here, and upon that bill Mr. Justice Pardee has sustained our claim; so that at the present time the State of Louisiana and her officers are enjoined by the United States Court, and they are commanded to pay it by the State Court.

Therefore, your Honors will see that, so far as the

case of the State of New Hampshire is concerned, 17
aside from the question of her right to sue, there arises precisely the same question that is involved in the case of Elliott vs. Wiltz et al. on the equity side of the Court, asking for an injunction to restrain the diversion of this money.

Now, I propose first to address myself very briefly upon the subject of the right of the State of New Hampshire to maintain this action on the original bill. Your Honors will find that the literature on the question is very brief and very clear. It will not 18
take you a great while to see all that there is of it. I am frank to say to you, that the question suggests nothing new upon the subject. I find it has been investigated and discussed comparatively recently by Hon. Bradley T. Johnson, of Richmond, and I find that for a number of years past it was discussed and presented by Mr. Justice Curtis, after he left the bench of this Court, and to a brief extent by Mr. Justice Story. The argument of Mr. Johnson I have laid before your Honors in the "American Law Re- 19
view," published in 1878; the argument of Mr. Justice Curtis I have put in a portion *in extenso*. There are one or two other places where he substantially said the same thing, but I am not aware that there is any addition to be made to the argument he presents in the brief extract from the publication he made a number of years ago in the "North American Review." Now, I do not propose to go over and recite to your Honors the various cases or the various writings which are cited by these gentlemen as 20
sustaining the authorities which they claim. To a certain extent I think there is no controversy now, and none ever has existed, that they are correct and sound. I cannot see that there is any flaw to be found in the reasoning that may be presented upon the side taken by the gentlemen who represent New York; and I am equally free to say that I find no flaw in the reasoning that is presented in the brief, and I suppose will be presented in the argument on the side representing the State of Louisiana. Each

21 is sufficient in itself. They present the alternative spoken of and commented upon by logicians where one must choose entirely between two separate lines of thought. Now, I propose to state in a very brief way the line of argument adopted by these gentlemen. What they say is that at the time of the adoption of the constitution, prior to the constitution, each State was sovereign in the same sense that any other organized political community is sovereign. In that case the State was charged with
22 the duty and it had the right to protect the individual rights of its citizens in claims against foreign countries. Now, there is some evident display of learning in the statement of that proposition. I am not aware that there is any question about it. I find nothing to the contrary in the brief of my friend on the other side. An organized political community may or may not in any particular instance see fit to adopt and maintain claims of its citizens. I find quotations from
23 prominent statesmen of all countries upon the brief of my friend to the effect that they will not in certain cases, and I find equally strong quotations from equally prominent statesmen that in certain cases they will. In both, it is a question of discretion; in both, it is simply for them to decide whether, according to the lights moving them as a policy for the country they represent, it is desirable that they shall sustain and maintain those rights against foreign countries. No one has ever disputed the right
24 upon the part of a nation. It has been a question of policy and discretion whether they should exercise the power. The power itself has never been disputed.

JUDGE BRADLEY: If a strong nation resolved to proceed against a weak one to collect a claim of its citizens, it will be likely to succeed and recover the money by military execution; but suppose they are equally matched, and both have steel navies of equal strength, would the law of nations * * *.

MR. PECKHAM: There is nothing in the law of

nations to prevent resistance; and on the other hand 25
the action of solving a controversy by war implies, of course, resistance.

JUDGE BRADLEY: In other words, it is a question of power.

MR. PECKHAM: It is a question of might; and I may add, your Honor, that in a certain sense might is not only physical, it is a question of power, of presentation, of argument—the weakness of our side and the strength of the other, we will say. I remember the maxim that force and 26
might rule all things in the world; and the suggestion that your Honor makes applies not only to international controversy, but in early times applied to individual controversy. The first court for the solution of controversies was the court of arms. The answer made is that as between this country and all others relations exist only with the United States, and that the general principle of law is that before a government will assume or undertake to defend the wrongs of their citizens, those citizens 27
must have exhausted the ordinary and proper methods of procedure in the courts. They have done so in this case, and it is only the United States must be brought to account for that failure and that wrong, and be responsible. What remedy the United States would have, would, I suppose, depend upon the very familiar principle of the common law that he who has paid money for the benefit of another has a right of action for the expenditure; and if the United States Government had been made re- 28
sponsible to a foreign government they could on their part turn to the individual state for whose default they have been responsible and enforce their claim.

I was going on to say that from the point at which we say each State had the same rights as any other country to protect the rights of its citizens as against any other, we made this step: the adoption of the constitution. That constitution did not leave any sovereign State. There is nothing so mislead-

ing; there is nothing upon which we are so liable to err as in the use of words, and dragging down words from a time when they had a certain meaning to a time when that meaning is no longer relevant, proper or appropriate. The moment you provide as you have provided in this constitution the sovereignty is defeated. I do not propose to go into any political discussion upon the question that has agitated this country and its politicians as to the relative rights of sovereignty between the States and the Union. It has nothing to do with this question. I simply say when you employ the term "sovereign State" you must employ it with the recognized fact that almost all the rights that have been regarded heretofore as sovereign, and as to which the claim has been made for sovereignty and dignity, have been yielded by those States affirmatively and beyond any possible question. They are not in the family of nations. They cannot make any compact or agreement with any other party—neither war nor peace, nor coinage of money, nor the thousand other things which ordinarily accompany the thought of sovereignty in our minds belonging to these States. They have powers of making contracts; they have powers of administration upon the matters that most concern perhaps our daily life; but we are misleading ourselves and following the fancy of a word when we suppose that by the use of the term "sovereignty" we are adding to definition. When they came under this Constitution they agreed to provide for the solution of controversies in the courts of the country. Now I want to call your Honors' attention to this feature of it: that always, under all governments, and in all times, there has been provided some tribunal for the solution of controversies between the government and the individual citizen. No one has ever supposed or dreamed that such controversies do not arise. All have agreed that they constantly do and will arise; and from the time of the first organized political community to the pres

ent, tribunals of some character have always been 33
provided for the solution of such controversies, Some writers say that originally the Queen could be sued in England and in all cases. If it was not in courts it was in Parliament, or legislative bodies or committees—in some way and by some means there universally has been provided a means of solving controversies that arose between citizens and the government.

Now, it is said that when the Constitution of the United States was adopted it was provided in that 34
Constitution that controversies between the States and individuals, or other individuals, instead of being solved by legislative bodies or committees, or boards of audit, should be solved in a tribunal of the United States; and then came, under the Constitution, the first great controversy as to whether an individual might sue a State. Now what was the issue there? Why, the profession there was that so far had this country advanced over prior organized political communities that all controversies between States and 35
the public were to be solved in the same way, and enforced by the same tribunals as controversies between individuals. His Honor, Mr. Justice Gray, is perfectly correct in saying Mr. Hamilton Mr. Madison and some others took the ground distinctly and clearly that under the Constitution, as it originally stood, an individual could not maintain that action. Other gentlemen equally well known, equally prominent (all of whose actions are stated fully in the arguments that are submitted to the Court), 36
who partook in the debates of the Constitutional Convention, who partook in the debates of the constitutional conventions of the States which adopted it, were equally pronounced in those conventions and in those debates that it did authorize actions by individuals; and when it came into this Court Mr. Justice * * * * , who himself was a member of that commission, gave perhaps—and it may not be invidious to speak of one rather than another—

gave perhaps the strongest opinion in favor of the view that an individual might sue. The position taken by these gentlemen was this: The Constitution of the United States was not a mere digest. It was not merely gathering the political customs that had hitherto existed. It was a new departure. It meant to provide, and it did provide, that wherever controversies of a judicial nature arose, even between the Government and the citizen, they should be solved in the same way. The position was based upon the idea that prior to the adoption of the Constitution there had been no such thing as responsibility of governments in courts; and that in adopting this language in the Constitution, reference must be had to the prior condition of things, and as to whether such actions might have been brought against the States prior to the formation of any constitution between them; and the inference drawn was that it must be construed according to the condition of things that existed prior to the Constitution. Well, that was the idea that was rejected. Now, as I say to your Honors, you must choose between the two.

What has been the effect of that constitutional amendment taking away from the individual this right to call a State before a court, instead of a legislative committee, to do to him the justice which States always profess themselves ready to do? What effect did that have upon the old right that the State had ceded and given up at the time she adopted the original Constitution with the clause in it that an individual might sue? Why, the argument is that it never could have been intended by the adoption of that amendment that these States that were so dainty and careful of their sovereignty and their dignity should not only have given up the right which they originally possessed, and which they surrendered by the adoption of the constitution of protecting their citizens themselves, but that the citizen ought to have the right given to him by the Constitution of pro-

tecting himself. If, say they, you once concede 41
that the citizen, by this amendment, has lost this right, that very moment the State resumes her right which she had prior to the adoption of the Constitution of herself protecting the citizen. Now, your Honors, I might enlarge upon that for a day. I could add nothing to it. That is the argument: Is it to be supposed that the citizen of a State is to be left absolutely without the right which the citizen of any other political community confessedly does have? Is there nowhere, either in State, or United 42
States, a political entity that can take up the wrongs of this citizen and prosecute them somewhere and in some way when that right confessedly exists in every other political community in the civilized world? Can it be said that a citizen of the United States, or of one of the United States, is to-day, under this Constitution, without any political entity capable and charged with the duty of protecting him in his rights? We submit, sirs, that when the constitutional amendment was adopted taking away 43
from the individual the right to prosecute in the State Courts, or the United States Courts, by the very fact that it was taken away from him it was restored to the State to protect him as it might protect him before.

JUDGE * * * * * * * * *

MR. PECKHAM: I would regard the assignment, sir, as a matter of very little account one way or the other. It is a right which the State has to enforce the claims of her citizens. Of course, in claims of 44
this character an assignment is requisite to show good faith, and putting the State in a situation where it might not go through the extremely disagreeable performance of attempting or assuming to protect rights which after all did not belong to the citizen. That aspect of the case is alluded to by Mr. Justice Curtis in his opinion. He says it can hardly be supposed that a Court would require a State to prove it held the evidence of these claims or obligations. The fact that it makes the claim—that dig-

45 nity of it as a sovereign State—the fact that it makes the claim is sufficient, if it can stand in a position where it can give acquittance to the debtor. I do not think there has been any suggestion of the necessity of an assignment. I am not aware of it. It is claimed that in intercourse with individuals, that whatever rights may belong to an individual so far as a foreign State is concerned, belongs to the State of which the individual is a citizen. There is only this aspect of the case in
46 which an assignment strikes me as being of force. I do not know of any principle by which a debtor can inquire in any further degree into the title of a creditor making a claim than to be sure that if he pays it he gets a legal and valid acquittance. Whether the creditor may hold it in trust or in fraud are matters of no importance, so long only that the debtor, when he pays, is relieved from the possibility of having to pay again. That, certainly, is the law of the State of New York. I presume it is the
47 law of the State of Louisiana, because in the State of Louisiana there has never existed the difficult element of the common law which declines to recognise an assignment of a chose in action. The State of New York, in cases which I have cited, holds directly that so long as between assignor and assignee there is a valid assignment so that the assignee may give acquittance, there is no right or power on the part of the debtor to inquire. Now, that, as affecting the case, would make it important
48 on the question of assignment, because, if there be an assignment here, a holding of these coupons by the parties making this claim, so that, upon payment, they may deliver it, or, upon partial payment, they may indorse, and nobody else can make any claim, why then this State is in the same position as any other party; and you have to come to the absolute position that this State is incapable, under any circumstances, or under any aspect of the case, of holding or owning this contract, before you can say the State cannot maintain the bill.

Now, there is this other feature in the Constitution of the United States, which I frankly confess to your Honors is a feature that strikes me as vastly more difficult for us to meet than those which I have been discussing. The mere question of jurisdiction of Courts, the mere matter of the right and power of the Court to decide between these parties, it seems to me, is beyond any possibility of discussion, because the Constitution says, in so many words, in direct language, "controversies between States." Now, it is a controversy between States, or a controversy between a State and citizens of another State. Your Honors made some suggestion as to the question whether there had ever before been presented in this Court a controversy upon a contract. I will say this: that the original contention here was, that although this Court would have jurisdiction in controversies *ex contractu* it had none in controversies concerning boundary or sovereignty, because they were of a political nature; and that was the very contention in all the boundary cases, that they involved questions of a political character. Sovereign rights, as distinguished from property rights, and the contention was that the Court had no jurisdiction to decide upon questions of a political character. You decided that you had; and would not it be most extraordinary now after a controversy in numerous cases strongly contended, has been settled to the effect that you had jurisdiction in questions of a political character, to turn around and say that they are the only cases of which you have jurisdiction. The first cases that were brought into the Court were all of them *ex contractu*.

You have decided that where a question was political in its character and also judicial, you would not refuse jurisdiction of the judicial controversy because it was political. Your Honors will find in my brief, without my turning to it at

53 the present moment, a number of citations from your opinions in various cases where you have held this. It would seem to be urged here as a reason why you should not allow this, that controversies affecting boundaries, which are certainly controversies of a political character, are the only controversies over which your Honors have jurisdiction. Now, the first cases that were brought into this Court were all of them cases *ex contractu;* some seven or eight; prior to the Chisholm case, and prior
54 to the amendment preventing individuals from suing; and since that time there has been no suit brought in this Court in that way.

Now, your Honors, I do not know that I can add, or care to add, anything on the right of a State to bring this suit; and I shall proceed to discuss (supposing the States have the right) whether the parties are entitled to the relief, and what the relief should be. I should say before commencing, however, that the clause of the Constitution which pro-
55 vides that no State shall enter into any compact with another State * * * * * because, as I said, the question of jurisdiction depending upon the language of the Constitution, which says it shall have jurisdiction of all controversies, it is putting the question really upon the basis upon which it should stand for presentation, which is having jurisdiction and entertaining this question, still has this State stated a cause of action in this complaint? Has she under
56 the Constitution the right to acquire this cause of action, and the right to ask the Court to enforce it? It is a question of whether this complainant has this right. Now, if the word "agreement" is to be construed in the ordinary sense of the common law term, why the State of New York or the State of New Hampshire could not have agreed originally to lend to the State of Louisiana the money and have taken the bonds from her. But the question is: Is the word "agreement," as used in the Constitution,

intended to cover that kind of agreement, or is 57
it intended to cover only an agreement of a similar character to those that are repeatedly referred to? Now, I have found one case in the State of Georgia where that question is directly involved, and where they say that the word agreement means "compact or treaty, or agreements in the nature of and similar to compact and treaty." I say there is one case in the State of Georgia which holds that States may enter into contracts and agreements in the ordinary sense of the common law term, and that the words 58
in the Constitution "compact or agreement"—the word "agreement" should be construed the same as the word "compact," and as referring to the names signifying arrangements made between several States. I find but a single case where those words come under judicial construction and interpretation, and that is in the case in Georgia; and it was there held that they did not apply in the ordinary common law sense of the word "agreement;" and I find also that construction is adopted by Mr. 59
Story in his commentaries.

Adjourned to April 19th, 1882.

MR. PECKHAM: If your Honors please, in the few remarks I shall further address to the Court, I propose to discuss the cases as presented in the two cases on appeal by writ of error.

Your Honors will find as an appendix to my brief 60
in the State case the opinion in the first place of Mr. Justice Billings, who dismissed the bill in the injunction case below, and also denied the application for a mandamus; and also the opinion of Mr. Justice Munroe, in the State Court, who held on intervention on our part, that the law of which we complained was unconstitutional, and that we were entitled to the relief we asked. That view, as I said yesterday, was reversed in the Supreme Court of the State on appeal, and their opinion I have not got. Your

Honors will find in the brief that I have presented in No. 845, in the appendix, the opinion of Mr. Justice Pardee on the motion for a preliminary injunction in a precisely similar case to that here on appeal. They present all the judicial action on the subject I know of, with the exception of the opinion of the Supreme Court of the State, which I have not obtained, and also excepting the dissenting opinion of Mr. Justice Billings in this last case, but that is of the same precise character as his opinion in the other case.

Now, I may remark with regard to the opinion of the Supreme Court, that it stands in this position: Judge Munroe, who decided the case first, I believe, was a judge who had been elected or appointed under the old Constitution, prior to the Constitution of 1879. The judges of the Supreme Court were appointed under the last Constitution by Governor Wiltz, who, at the same time, was the principal mover for the adoption of the Constitution in the convention. That suit in the State Court was brought by a Mr. Newman, who was a general creditor of the State, for a mandamus against the Treasurer to pay a claim he had which was not of the character of these bonds, and in that suit we intervened.

JUDGE * * * * : The Court entertained this suit against the officers of the State for the purpose of compelling them to pay that debt.

Mr. PECKHAM: Yes, sir; the State Court entertained the suit, but on the intervention held that the law under which Newman proved his claim was unconstitutional, inasmuch as the law by which we now claim showed these funds were meant for us. The Supreme Court of the State reversed that, and held that the application was well made by Newman, for mandamus, and awarded him mandamus against the State officers requiring them to pay his claim out of this fund. Now, I am informed by a letter from there, that they have made some provision—I do not know what it is—for the retention of

sufficient of these funds in the hands of the State 65
Treasurer to pay the claim on these bonds, should this Court award that we re entitled to the payment of the coupons. Well, there are some eighty odd thousand coupons, and they are but a fraction of the bonds which these parties really own.

Now, your Honors will find in the brief that I presented in the State Case, I think, all the Acts of the State of Louisiana to which there is any occasion to refer, and they are set out in full. The first is the Act, under which we claim, of 1874, Act 66
No. 3; and we have followed that by the constitutional amendment in the same relation; and we have followed that by the Act of the State of New Hampshire under which this special proceeding is brought; and we also have the State debt ordinance, which is the proceeding under which the defendants justify their refusal to appropriate the money as we ask. I ought, perhaps, to say, as some of your Honors may be more particularly familiar, as I was, with the common 67
law proceedings in common law States, that in the mandamus case here, No. 845, there are certain findings of the Court, and there is no exception to those findings, as we would have in the State of New York, in order to raise a question for the appellate Court. When I first opened that record it struck me as not entirely regular, according to my notion, and I wrote to New Orleans in relation to it, and am informed by my counsel there that it is not in accordance with the practice of their State to file 68
any exceptions. It is an unknown proceeding; and that the writ of error where the case discloses the findings of the Court brings up precisely the same questions as in the State of New York if exceptions had been filed.

Now, I want to call your Honors' attention to this, in order that the precise question raised here will be seen. To some of your Honors the act is familiar; to some of your Honors who have more recently come into the Court it may not be familiar.

69 It is the same act that was involved in the case of the Board of Liquidators against McComb. This act provides for the funding of the then existing obligations of the State of Louisiana by bonds, provision for the issue of which is made by this act.

The fifth section provides for the issuing of these bonds, "Said bonds shall be used for no other purpose or purposes than is authorized by this act." I would also call the attention of your Honors particularly to section six. I do not know that it has any
70 precise legal bearing, but perhaps it may have; it certainly has a very strong moral bearing upon the question. This section provides that notice of the adoption of this act shall be published in one or more journals in New Orleans New York, London and Paris; so that in the invitation that Louisiana made to the holders of her debt at that time existing, by which she invited them to remit forty per cent. and to take these bonds in its place, she published to the world so far as pos-
71 sible the terms of the act under which she proposed to make this reduction, with the peculiar and I think unprecedentedly strong provisions to secure the payment of the bonds. Now, section seven provides for the levying and assessment of a tax, and "the revenue derived therefrom is hereby set apart and appropriated to that purpose and no other," and that it shall be deemed a felony for the fiscal agent or any other officer of the State, or the board of liquidators, to divert the said fund from its legitimate
72 channel as provided in the act. There is a further provision which bears strongly upon a certain aspect of this case, that if in any one year there is a surplus of revenue after paying the interest on these bonds that that surplus shall be devoted as a sinking fund to retire the principal of the debt. That same seventh section provides that the tax shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest. Section eleven provides that "each provision of this act shall be and is hereby declared to be a contract

between the State of Louisiana and each and every holder of the bonds issued. There is another section providing that no Court or judge should have any power to enjoin, &c. Now, at the same time that act was passed another act was passed providing for the submission to the people of the constitutional amendments. Those amendments are set out on the eighth page of my brief, but I will read them : 73

"No. 1. The issue of consolidated bonds authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor: to secure such levy, collection and payment the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury. 74 75

"No. 2. Whenever the debt of the State shall have been reduced below twenty-five millions of dollars the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased; and this rule continue in operation until the debt is reduced to fifteen million dollars, beyond which it shall not be increased, nor shall taxation for all State purposes, excepting the support of public schools, ever exceed twelve and a half mills on the dollar of the assessed valuation of the real and personal property in the State, except in case of war or invasion. 76

77 "No. 3. The revenue of each year derived from taxation upon real, personal and mixed property, or from licenses shall be devoted solely to the expenses of the said year for which it shall be raised, excepting any surplus remain, which shall be directed to sinking the public debt. All appropriations and claims in excess of revenue shall be null and void, and the State shall in no manner provide for their payment."

Now, these constitutional amendments were
78 adopted and became a part of the Constitution of Louisiana, under which these bonds were issued.

The State debt ordinance, which is part of the Constitution adopted in 1879, provides that the money in the hands of these officers, raised by the tax levied under that act and appropriated to the payment of the coupons falling due on the first of January, 1880, shall not be so used, but shall be diverted from that purpose to which it was appropriated by this act, and by these constitutional amend-
79 ments, to the general purposes of the State government. Under that and a law passed pursuant to it, Newman applied to have his claim paid, amounting to about $80,000.

Now, your Honors, I am not aware that at any time or anywhere, in the very considerable litigation that has been had under this Constitution of 1879, and I believe I have taken part in all of it, either directly or indirectly, I am not aware that there has been any intimation anywhere by anyone that this
80 act was constitutional—that the Constitution was constitutional. It is in direct, absolute opposition to the terms of the Act of 1874, under which the bonds were issued. But it has been claimed that, although unconstitutional, it raised a political question; or, in other words, that its unconstitutionality applied to the political or legislative power of the State of Louisiana, and that, if they failed to heed the injunction or warning of the constitution of the United States in that respect, there was no power to compel them to. Now, in regard to

this question I propose to follow the same plan that 81
I did yesterday in regard to the others. I do not propose to weary this Court with a detailed examination of cases, or with reading the statements or opinions which seem to me to support conclusively the views that I shall submit to the Court. I propose simply to state the views that seem to me to be supported completely and thoroughly by the facts and the cases, familiar to the Court, probably—at any rate they are very readily accessible; and whether I am supported by them or not, I leave to 82
your examination to determine.

The suit of the State of New Hampshire, assuming for the moment that the State of New Hampshire has the right to sue, is for precisely the same purpose as that of John Elliott in No. 856. It is a suit to restrain the officers of the State from diverting this fund from the payment of coupons to which the law of 1874 appropriated it, to the general purposes of the State, and whether we can have that relief or not as an individual, aside from the right 83
of the State to sue, is what I am about to state to the Court.

Now, I find this principle plain and clear, and not controverted; that where a duty is imposed upon an officer (state or national it makes no difference), and an individual has an interest in the execution of that duty by that officer, process from the Courts will go to compel the execution of the duty. I also find this principle, as to which there is no controversy: that where a discretion is vested in 84
an officer, or a board, or a department, and the officers exercise that discretion in a way not acceptable to the party having an interest in its exercise, that Courts will not interfere. Now, those are two principles to a certain degree conflicting; that is, they present two opposite sides of a question, as to which there is no dispute by anyone, and the question is, within which of those two principles is this case embraced. Now in the case where we ask for an injunction, the law says in so many words:

"This fund when raised shall be for the purpose of paying the coupons on these bonds." There is a provision in that law for ascertaining and deciding certain questions that may arise within the discretion of those officers, and certain of those questions are relegated to the State Court for decision—the ownership of the debt, whether there is a class to be funded; but the law provides in the strongest possible terms that human language is capable of furnishing that those moneys shall be used for the purpose of paying these coupons, and for no other purpose; and what I submit to your Honors is that there is no possible room for discretion. There is no possible way to say that these officers can invoke the principle of discretion to authorize their diversion of the fund appropriated by this act for any other purpose than the payment of these coupons. Now, there are vast numbers of cases that have been decided upon points of this character. I shall submit to your Honors this principle, that I find laid down in the English cases. It places it in such clear definite language that it seems to me the question cannot be presented better in any other way. Numberless applications have been made to the English Courts for writs of mandamus against officers of the Government to pay claims to parties prosecuting the writs. Very many of them have been refused. The Courts say this in regard to it: "If the appropriation by Parliament has been to a department, giving the department the discretion of spending the money in the way that it likes, no writ will go; if, on the other hand, there has been a parliamentary grant appropriating the money from the treasury for a specific purpose to a specific person or ascertainable person, or class of persons, so that the discretion has been exercised by Parliament, and is not left to the department, the writ will go. Now, I want to call your Honors' attention to two or three lines that I have quoted from the English cases that illustrate it. On page 48 of my brief in the case of Murray against Earl

Clarendon (L. R. 9 Eq. cases, 20), Lord Romilly, M. 89
R., says:

"But the difficulty, or rather the impossibility, of treating it as a trust fund is this: That it is paid for the general purposes of the office. It is not paid in trust for any particular person. The case that was cited was to this effect: That if Parliament votes a sum of £1,000 for John Smith, and the treasury devote in their books the payment of that sum to other purposes, then a mandamus will lie to the treasury to order them to pay that £1,000 to John 90
Smith. But there is nothing of the sort here. Parliament has merely voted certain sums to her Majesty, and of these sums £600,000 are to be applied to the foreign office. The distribution of that amount is left to the officers of the foreign office to apply, * * * * and there is nothing whatever to connect the plaintiff with a penny of this money in any respect."

The distinction is very clearly stated in another case that I have referred to on the next page by 91
Chief Justice Cockburn. He says:

"Therefore the question comes to be whether the Lords Commissioners of the treasury, when this money gets into their hands are bound to apply it as the servants of the Crown, or as the servants of Parliament, who vote the money."

And in the same case Lord Cockburn says:

"The question remains whether there is any statutable obligation cast upon the Lords of the Treasuary to do what we are asked to compel them to 92
do by mandamus, namely, to issue a minute to pay that money; because it seems to me clear that we ought to grant a mandamus if there is such a statutory obligation."

Now, a mandamus has been granted in several cases in England, which are referred to; and it is granted always where there is precisely what there is here, a statutable obligation upon officers to disburse money in accordance with the provisions of an act of Parliament or of the Legislature.

93 Now the case of Twycross agst. Dreyfus has been commented upon by their Honors below, and by counsel. That was a case where an effort was made in England to sieze moneys in the hands of an agent of the Peruvian government in order to apply them to the payment of Peruvian bonds; the money being the proceeds of guano, and the endorsement on the contract expressing that the guano of the government was to be applied exclusively to secure these bonds. Your Honors will notice in that case there
94 was this distinction: In the first place, the action was brought in a foreign country, it was not brought in the courts of the power that had made the obligation, or in the Courts of the power that had created the officer and imposed on him the duty. It was brought to seize upon funds in the hands of a mere agent in a foreign country. Your Honors will notice this difference also ; that in that case there was nowhere any obligation imposed in any way upon this agent having these funds to em-
95 ploy them as asked for by the complainant. There was no obligation anywhere. There was a bond given by the Peruvian Government, and on the back of that bond was endorsed that the revenues from guano were applied or secured for the payment of that bond ; and the suit was brought against this agent, in whose hands the money was placed for other purposes, and not with any direction to apply it to the payment of these bonds. It is substantially a mere action against a foreign government in a
96 foreign state. But if the money had been paid to that agent by the Peruvian Government with directions to him to pay the money or use the money for the purpose of paying the bonds, I apprehend there would have been a different decision. Then that agent would have held this money as the trustee of the bondholders under instructions from his principal to apply it in a certain way.

Now,I want to call your Honors' attention to one case in which this question has been before this Court under this same law precisely. In the case

of the Board of Liquidators against McComb in 2 Otto, the action was brought by holders of these same bonds. It was brought against these same defendants. It was brought under this same act. It was brought for the purpose of enjoining the action of these same defendants, which would have been justified by an act, which was passed subsequently to 1874, had that act been constitutional. This Act of 1874 provided that the debt should not exceed fifteen millions, and that parties who had claims prior existing should fund them at the rate of sixty per cent. The Legislature then passed an act subsequent to that time, providing that holders of different classes of securities might come in and have them funded in bonds, issued under this act at par; and the officers of this Board, in compliance with the Act of the Legislature were about to fund this other class of indebtedness at par in these same bonds, when the bill was filed to enjoined them. Consequently this Court has held upon this very law with regard to these very parties, that where a law of the State of Louisiana unconstitutionally provides for the disposition of the bonds in hostility to the Act of 1874, it will be enjoined. Why not? The mere funding of a different indebtedness of the State of Louisiana at par was the sole matter complained of in that case; but the matter that is included here is the absolute diversion of all the money raised under these statutes, for a different purpose. Now, how is this to be justified under a law or a constitutional provision, and give any effect whatever to the provision of the Constitution of the United States that the obligation of a contract shall not be impaired? This assumed law or constitutional provision of 1879 of the State of Louisiana, I submit must be regarded precisely, by this Court, in the solution of this question, as if it did not exist, as if it had not been passed at all. The law of the State of Louisiana, they say, instructs these officers to do what the law as passed by that State before said they should not do. But what we submit is that there is

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no law, no instruction anywhere in the State of Louisiana in any degree in hostility or contravention of this law of 1874, because nobody had authority to pass such a law. Would your Honors hesitate a moment? Would the State Courts of Louisiana hesitate a moment? Has not their decision in the Newman case shown they would not hesitate a moment? If this law or constitution of 1879 had not been passed, and if the sole reason why these individual men said that they would not execute this law is because they thought, in their own executive discretion, that it was not best to execute the law, would your Honors hesitate to say to them by *mandamus* or injunction "you shall?" No one has so hesitated heretofore. They say that the constitutional convention, or an Act of the Legislature has instructed these men not to do as the law of 1874 provides they shall do. But the constitution of the United States, which was adopted and made substantially a part of the law of Louisiana when she came into the Union, says this: "The power to repeal a law of the State, which is a contract, does not exist in the legislature or in a constitutional convention, or even in the hands of the people of the State." It exists, and exists nowhere else but in the people of the State of Louisiana acting through their legislative assemblies united with the requisite number of the legislatures of the other States, in order to repeal it in accordance with the terms of the constitution of the United States. That is the power, that is the authority, and that is the only power that has authority to say that a law which in itself makes a contract shall be repealed. Now, I cannot see that there is any distinction to be drawn in the two cases of saying, on the one hand, to the State of Louisiana: "You shall not issue these consolidated bonds to persons holding a different class of indebtedness except at sixty per cent, and not at par," and saying to them, upon the other hand, in the case we now bring before you: "You shall not divert the sum that you have solemnly

pledged in the form and shape of a contract, advising creditors in other States, advising us before we took the bonds, that it was a contract which you had no power to change. You shall not do that except that you do it in conformity to the law of the State of Louisiana as promulgated by her legislature, but of the law as expressed in the Constitution of the United States, and according to the form therein prescribed." 105

Now, your Honors, that is the simple question, for the solution of which we ask your attention. 106

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108

109 ARGUMENT OF

WHEELER H. PECKHAM,

IN REPLY.

In the few remarks I have to make in reply, I shall address myself exclusively to questions arising in the individual cases, or those No. 845 and 856, leaving for the counsel for the State of New York
110 to answer the argument of the counsel for the respondent, so far as it relates to the question of the right of the States to sue.

The counsel for the respondent, with respect to the mandamus case, or No. 845, said that it was a case of which the State Court had no jurisdiction, and which was removed to the United States Courts, being equally without jurisdiction.

I submit that the learned counsel is in error in both positions. True, in the case of Hart
111 vs. Burke, the Supreme Court of Louisiana, in a certain sense, held that the State Court had no jurisdiction to hear the mandamus; but that was only on the ground that they had not jurisdiction to hold the Constitution of 1879 unconstitutional as conflicting with the Constitution of the United States.

The Supreme Court of Louisiana has never held that in a case like that presented in No. 845, and which did not involve this constitutional question,
112 they had not jurisdiction to award mandamus to State officers. On the contrary, in the late case of Newman against Burke, decided within the past few days, and a copy of the opinion in which I have sent for and will furnish to the Court so soon as received, the Supreme Court of Louisiana directly held that they had power to, and did, award mandamus to these identical State officers to pay out this identical fund, but to persons creditors of the State, not by bond; and awarded it on the ground that by the Constitution of 1879 the provisions of

the Law No. 3, of 1874, were repealed, and that the general creditor was, consequently, entitled to this fund preferably to the bond creditor. 113

It is thus clear, beyond question, that so far as the writ of mandamus is itself concerned, and passing over the constitutional questions involved in this case, the Courts of Louisiana, including the Supreme Court, to the very last moment, have always held, and now hold, that mandamus will go, and is a proper remedy.

The learned counsel for the respondent, however, suggests that the Circuit Court of the United States had jurisdiction of cases removed from the State Court only to the same extent, and in the same manner, as if such case had been originally a case in the Circuit Court; and then argues that the writ of mandamus is, in the United States Courts, an ancillary writ only. 114

I submit that, in that point, the learned counsel is again in error. True, at a very early period in the jurisprudence of this Court, it was held that the United States Courts had no original jurisdiction to issue mandamus, and that the writ was ancillary only. The first case in which it was so held is that of McIntyre against Wood, 7 Cranch, 504. The same doctrine was subsequently held in M'Clung against Silliman, 6 Wheat., 599. 115

In those cases the jurisdiction was denied, on the ground that Congress had not given to Circuit Courts all the judicial power which by the Constitution had been vested in the United States. It was particularly emphasized that Congress had failed to give jurisdiction in cases arising under the law and Constitution of the United States, as provided in the Constitution; and it was pointed out that, in such cases, Congress had provided for an appeal from the State Courts to the Supreme Court of the United States, under the twenty-fifth section of the Judiciary Act, and had made no other provision for such questions being passed upon in the United States Courts. 116

117 In 1875, however, the act was passed under which the removal in this case was had. By that act jurisdiction was *in terms* given in all cases arising under the constitution and laws of the United States; precisely the *legal* provision in accord with the constitutional grant, which the early case above cited found did not exist under the original Judiciary Act , in Sections 11 and 4.

Under that law the Circuit Courts of the United States have original jurisdiction to issue man-
118 damus in particular cases; and under that law the removal, from a State Court, of a mandamus proceeding to the Circuit Court of the United States, has by this Court been held to be legal, and its refusal to be error.

In Railroad Company against Mississippi, 102 U. S., 135, the precise question was whether a mandamus proceeding commenced in the State Court and attempted to be removed to the United States Courts by the defendant, was such a suit or pro-
119 ceeding as was contemplated by the act, and as should have been removed. Mr. Justice Miller in that case, dissented from the majority of the Court, which majority held that the case should have been removed. The dissent of Mr. Justice Miller, however, was only upon the ground that the Act of 1875, referred to cases where it appeared on the plaintiff's own papers, or showing, that the case was one arising under the laws or the Constitution of the United States; and that where,
120 as in that case, questions under the law and Constitution of the United States only arose upon the defendants' return to the mandamus, the case was not one for removal. The case at bar is one where it appeared upon the application for the mandamus itself that it was a case under the laws and Constitution of the United States, for the Constitution of 1879 of Louisiana was set out in the petition for mandamus, and the invalidity of the Constitution was asserted on the ground of its conflict with the Constitution of the United States.

The defendants in their return also raise solely 121
the question as to whether that Constitution of 1879
was valid or invalid under the Constitution of the
United States.

Thus we find that, as well by the dissenting opinion as by the opinions of the majority, this case is one of which the United States Circuit Court had jurisdiction, and which was properly removed from the State Court to the Circuit Court of the United States.

I have but a few words to add, upon another 122
branch of the case. The learned counsel for the
respondent made no answer to the claim in the individual cases of the appellant and plaintiff in error, other than that the contract evidenced by the bonds and by the law and Constitutional amendment of 1874, of the State of Louisiana, constituted what is know in civil law as an imperfect obligation; that it was not a perfect obligation, and hence was not justiciable in any Court of law or equity, and the claim could only be made or prosecuted *in forum conscien-* 123
tiae.

To this view we answer: that, conceding, for the sake of the argument, and so far as it may affect these individual cases, that a mere bond of the State is an imperfect obligation within the meaning of that term as used by the civil law writers; yet that this case does, within the meaning of those same writers, present a case of *perfect* obligation. In all cases of imperfect obligation, and in all cases of a mere naked bond or promise upon 124
the credit of a government, there has never, at any time, been any legal remedy to the promisee or holder of the bond. If there be provided by law, at the time of the making of the contract, any remedy whereby the holder of the bond or promisee can enforce the same in any Court of civil jurisdiction, the obligation then, so far as that remedy is provided, is a perfect obligation, and there exists a legal sanction which, according to the civil law writers, is the

125 one element that distinguishes a perfect from an imperfect obligation.

Now, in such a case as that presented by this law of 1874, of Louisiana, there never has been a day for the past two hundred years when a remedy in a Civil Court did not exist in every State in this country and in the Courts of England.

From the time of the case of the Bankers, to the time of the decision in the Supreme Court of Iowa, of the case cited in our principal brief, and even to
126 the present day, the Courts have uniformly held that where, in aid of or as collateral to, or as part of the bond and promise of a government to pay a sum of money to an ascertained class or individual, a fund has been levied and appropriated and an officer designated and charged with the duty of its administration, mandamus or injunction would go at the suit of the party injured. That right existed whether the Sovereign was willing or unwilling, at least so far as Sovereignty was vested in the Ex-
127 ecutive of the Nation. The writ would go in England, notwithstanding the opposition of the Crown, provided the grant had been definite by Parliament to the individual claiming the writ.

In Iowa the writ was awarded, notwithstanding the opposition of the Executive branch of the government, and in the cases in this Court to which we shall immediately hereafter allude, the same remedy was awarded *in invitum* the Executive of the States of Texas and of Louisiana.

128 Now, whether in the mind of civil law writers Sovereignty was to be found exclusively in the Crown, or Executive, or in Parliament, we are not advised. Such questions under the Constitution of Governments other than those of England and America never arose. It seems clear, however, that when the civil law writers speak of imperfect obligations as being those that have no legal sanction and which cannot be enforced in the Courts, they speak with reference to obligations which at the time they are made under and pursuant to the laws

which authorized them, cannot be enforced, and not 129
with reference to any such questions as arise only
in this country where an attempt has been made to
repeal laws which gave a legal sanction, which re-
peal conflicts with the organic law of the land.

I therefore submit that under the strictest con-
struction of the civil law rule of perfect and imper-
fect obligation, this obligation of the State of Lousi-
ana was and became a perfect obligation so far as
concerned the right of the holders of bonds to en-
force the specific levy and appropriation made in the 130
Act which authorized the bonds and upon the faith
of which we and all persons were invited to pur-
chase the bonds. That the State of Louisiana itself
understood that it was offering a perfect obligation
to these creditors would seem beyond dispute. It
makes the levy and appropriation for all time, so
far as may be necessary to accomplish the payment
of these bonds. Those sovereign acts were done and
completed at the time when the bonds were offered.
What was left was the mere ministerial duty upon 131
the part of those appointed to execute the trust re-
posed in them. Further than that the State of
Louisiana in express terms declared that the bonds
and every clause and section of the act is and shall
constitute a contract, the obligation of which shall
not be impaired, and by advertisements made known
to the capitalists of the world, the peculiar and
stringent terms of the contract she offered them.

The words used in that act, "Contract, the obli-
gation of which shall not be impaired," of course 132
refer to constitutional provision in that regard in
the Constitution of the United States. They refer
also to the well known series of adjudications in
this Court, holding that that constitutional pro-
vision was binding upon States as well as in-
dividuals.

Beyond question, the view taken of this question
by the State of Louisiana, was that it was a perfect
obligation; and equally beyond question that view
was held by the persons who purchased these bonds

133 and who now seek relief. It would be strange, indeed, if the Court should hold that a view of the contract which in its initiation was held by both sides is not the one which should be enforced.

Turning now for a moment to the decided cases: I submit that all cases decided in this Court against municipal corporations awarding mandamus for the collection of taxes for payment of their bonds, are direct authority for the position we take. In those cases the laws of the States repealing the delegation
134 of the power to tax have been held unconstitutional.

They were unconstitutional because, although the power of taxation is a sovereign power and belongs exclusively to the States, and although they can not be controlled in its exercise by the general government or by the Federal Courts, yet having allowed that power in a specific case to become a part of the sanction of an agreement by a legal political division of the State, this Court said that to allow it to be repealed after others had acted upon its faith
135 would impair the obligation of the contract.

Nor do I think that the fact that in those cases the municipal bodies had power to make a perfect obligation, or one that could be enforced by judgments, makes any difference. Their power so to do was derived from and a part of the political power of the State. Certainly, if the State itself had no power to make a perfect obligation it could not delegate the power.

In fact all municipal powers were first and prim-
136 arily exercised by the State itself. In England local improvements of all kinds were first made by the State, the State enacting laws for that purpose and providing certain Commissioners to execute the laws, and these Commissioners were held justiciable at the suit of the Attorney-General or any party injured. Subsequently, municipal corporations, which in their early history in England were mere private corporations, became the donees of the power to execute local improvement acts, and in that way became justiciable in the same way as the Commis-

sioners for that purpose appointed, at first had been. 137
Now, although in England the Crown was not suable on any of these contracts for local improvements, yet the Commissioners or the corporate municipalities were suable in all cases, either of non-action or of diversion. (See cases cited on p. 57 of principal brief). True, in our own country, municipalities have generally had the same powers and been liable for the same obligations as English municipalities after the Act of 1835 for Ireland, and 1840 for England. Nevertheless, it is familiar law in our country 138
that these same local improvements may quite as well be done by the direct action of the General Government as by the intervention of local corporations, and that when so done the persons appointed to execute them are justiciable in the same manner as corporations

People vs. Flagg, 46 N. Y., 401.

But we need not rely upon municipal corporation cases, and we need not go into any detailed exami- 139
nation of the history of municipal corporations in England or this country, as showing the origin of their liability and its political character, and the sanctions attached to it. We have the recent decision of this Court in two cases, which it seems to me beyond question sustain our view.

The learned counsel for the respondent has conceded in his brief the application of the clause of the Constitution "to contracts which execute themselves when made," such as deeds and charters. 140
But he denies its application to contracts executory in their nature, and which are not complete in execution as well as in promise at the time of delivery.

The case of Davis vs. Gray was a case of executory contract. The contract between the railroad company and the State was wholly executory. A large part of the discussion by this Court was whether by conditions subsequent the railroad company had not forfeited the right to have the con-

141 tracts executed. The *legal title* to the land remained in the State. The State was about to convey that legal title to other parties, and the act enjoined was the conveyance of such legal title, and the purpose of the injunction was that the railroad company might compel the execution by the State officers of the contract made to it.

True, it may be said in that case that the equitable title was vested in the railroad company, but when that is said it is declaring one of those fictions
142 so abhorrent to the learned counsel for the respondent. Equity, it is said, considers as done those things which are agreed to be done, but in that, equity considers a fiction, for the object of the bill is to compel the doing of the very thing which, in a certain sense, it considers as done. We might say that in the present case, in the same way, equity considers this money as ours; indeed, the very foundation of our bill is that, having been levied and appropriated, this money *is* ours, whether in the hands
143 of the State officers or in the hands of the tax-payers; and we invoke the aid of mandamus and injunction to give us our own, and not the money of the State in the Treasury of the State.

But to pass on to the other case of McComb v. The Board of Liquidators. In that case these same bonds and this same act were necessarily held to be perfect obligations, so far as the provisions of the act were concerned. An injunction was awarded that the State officers should not issue these bonds
144 to other creditors, unless upon the terms of sixty per cent. bond for one hundred old debt surrendered.

If there were no legal sanction; if there were no legal obligation by this Act; if, contrary to the ideas of Louisiana and her creditors at the time, the State proffered nothing but the public faith, nothing but the Legislative or Executive honor, on what basis did the Court then interfere and enjoin, providing that the benefits of the Act should be given only to persons who, like the persons then holding the

bonds, were sacrificing forty per cent. of their 145
claims?

The fact is that this Act was drawn and designed for the express purpose of making a definite levy and appropriation, which should give and include a legal sanction to every holder of the bonds. That was intended by Louisiana. It was by Louisiana supposed that she had so done. It was by the bondholders supposed that Louisiana had so done.

In the absence of the unconstitutional Constitution of 1879, no Court in Louisiana, or in any one 146
of the States, would have dreamed of holding that there had never been provided a legal sanction to the contract as made.

We submit that it would be a downward step in the jurisprudence of this Court, as annunciated through a century, to now hold that no matter what the appropriations and provisions which might be made by the State at the time it received the benefits for which it gave these promises and made its levies and appropriations, they were without a 147
sanction which was protected by the Constitution of the United States, or would be enforced by its Courts.

148

108-76

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OCT 10 1882
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UNITED STATES SUPREME COURT.

THE STATE OF NEW HAMPSHIRE
against
THE STATE OF LOUISIANA AND OTHERS.

No. 2. ~~Original.~~ 73
Original.

THE STATE OF LOUISIANA EX REL. JOHN ELLIOTT ET AL.,
Plaintiffs in Error,
against
ALLEN JUMEL, AUDITOR OF THE STATE OF LOUISIANA, ET AL.,
Defendants in Error.

No. ~~845.~~ 520
Mandamus.

JOHN ELLIOTT AND OTHERS,
Appellants,
against
LOUIS A. WILTZ, GOVERNOR, &C., AND OTHERS,
Appellees.

~~No. 856.~~ 529
Injunction.

ARGUMENT OF WHEELER H. PECKHAM.

SUPREME COURT OF THE UNITED STATES,

APRIL 18TH AND 19TH, 1882.

ARGUMENT

OF

WHEELER H. PECKHAM.

[* * * Denote Stenographer failed to report.]

MR. PECKHAM: *May it please the Court*—The bill that is filed is primarily and directly against certain individuals holding offices under the law of the State of Louisiana, and which officers the bill alleges propose and intend to divert a fund levied and raised 3
under the law of Louisiana, and appropriated by the law and the constitution of Louisiana for the payment of the bonds. The purpose of the bill is to restrain that diversion of the fund, under and pursuant to the law of Louisiana itself. The State of Louisiana is made a party to that bill, not because there is any direct judgment asked against the State of Louisiana, but because in other similar cases this Court has sustained a bill filed against individuals for the purpose of restraining their action as not 4
authorized by law. In those cases, to the objection that the State was not made a party, this Court say: "You could not make the State a party; that would oust you. Therefore, we will maintain the bill without the State being a party." But the State in those cases was the real party interested. It was her law and her policy that were in controversy. When we come to this Court and file an original bill to that objection, what could be said? Why, the constitution provides that in a case in this Court, of which

this Court has original jurisdiction, a State may be a party, and because of that fact, and because the State is principally interested in this controversy, and because it may be brought before the bar of this Court, we have brought her here, not asking relief directly against her, but asking relief against her officers, under her law, permitting her to be heard if she chooses. We have this controversy with these agents, whether they should perform this law that the State of Louisiana has directed them to perform.

We do not act upon laws outside of the State. But I am not inclined in any way to avoid the question as to whether the State of New Hampshire can maintain this suit against the State of Louisiana. All I am speaking of here now is, this case presents itself in the aspect of this plaintiff—laying aside the question of how this plaintiff stands—asking just the relief that has been granted in this Court, and in all Courts, in requiring State officers or United States officers to perform special duties imposed upon them by law. That is the aspect of the case that we present. It does not bring up simply the right of recovery against the State, and bring the two States here in juxtaposition——

JUDGE * * * * : Do I understand you that you got the relief in the Court below, or was not the judgment there against you, and are you not here on writ of error?

MR. PECKHAM: We are here on writ of error.

JUDGE * * * * : Specify the relief asked for.

MR. PECKHAM: The specific relief we ask in this New Hampshire case is that they shall be restrained from diverting this fund.

JUDGE * * * * : What is it in the other case?

MR. PECKHAM: One is of a similar character, for an injunction; and the other——

JUDGE * * * * :

MR. PECKHAM: Notwithstanding that we are asking relief, not of a character that has not been granted by this Court, but of a character that has con.

stantly and always been granted, still there does 9
arise in the case of the State of New Hampshire this question: whether the State of New Hampshire can absolutely by itself own bonds so as to give it a right to come into this Court or any Court—whether the State of New Hampshire can acquire an ownership that enables it to come into this Court and ask that these officers shall perform the duties imposed upon them, or whether if it is disabled from asking any relief, the Court will enable it to ask in a representative capacity for relief That question arises. 10

JUDGE : Does the New Hampshire case allege that the State is the actual owner of the bonds?

MR. PECKHAM: There is no question of that kind in the case. The answer alleges that the ownership, if any, is under the law of the State of New Hampshire, and by stipulation we agree that the State owns these bonds pursuant to that law of the State of New Hampshire.

Now, as the cases are to be argued together, I 11
want to state to your Honors the aspect of the other two cases. One of them was a bill filed by the plaintiffs below, of the same general character as that I have described now as the bill filed by the State of New Hampshire. It is a bill filed by the owners of these bonds to enjoin the diversion of the fund in the hands of these defendants from the purpose to which it was appropriated by that law, to wit: the payment of the coupons falling due on the 6th of June, 1880, to the general purposes of the 12
State government. That bill was dismissed below, and we brought it up here on appeal. The other case is a case where the same parties applied to the State Court for a writ of mandamus to compel the State officers to appropriate this money to the payment of these coupons. That case was almost immediately removed under the removal act to the Circuit Court of the United States, and there tried on the merits. That Court decided that the mandamus should not issue, and a writ of

13 error was taken to this Court. In both cases the pleas were substantially to the jurisdiction alone. In one of the cases there was a denial; and the finding of facts by the Court is identical, word for word, in the two cases.

Now, there has been considerable action in the Louisiana courts upon these matters, both Federal and State, and in order that the Court may have the whole matter before them at once I will state what that is. . Mr. Justice Billings held the Circuit
14 Court when these cases were first brought in it, and decided these two cases that are brought here. There was then an action brought by a man by the name of Newman, in the State Court of Louisiana. Newman had claims of a general character (not these bonds), and he asked the State Court for a mandamus to compel the officers having charge of these funds to pay him his claim out of these funds, thus making the diversion. In that suit of Newman we intervened in the name of John Elliott and others.
15 I refer to the case simply to give your Honors all the action of the Court below. Upon that intervention our claim was sustained by the District Court of Louisiana, and Newman's claim was refused upon the ground that this new law, or constitution, of Louisiana was unconstitutional.

We went to the Supreme Court of Louisiana, and that Court has very recently reversed the holding of the lower State Court, and has awarded a mandamus in favor of this man Newman to pay
16 his claim out of this sum, these moneys that are appropriated under this law. Now, in addition to that, there has recently been filed in the Circuit Court of the United States for Louisiana a bill similar to that which is now here, and upon that bill Mr. Justice Pardee has sustained our claim; so that at the present time the State of Louisiana and her officers are enjoined by the United States Court, and they are commanded to pay it by the State Court.

Therefore, your Honors will see that, so far as the

case of the State of New Hampshire is concerned, 17
aside from the question of her right to sue, there arises precisely the same question that is involved in the case of Elliott vs. Wiltz et al. on the equity side of the Court, asking for an injunction to restrain the diversion of this money.

Now, I propose first to address myself very briefly upon the subject of the right of the State of New Hampshire to maintain this action on the original bill. Your Honors will find that the literature on the question is very brief and very clear. It will not 18
take you a great while to see all that there is of it. I am frank to say to you, that the question suggests nothing new upon the subject. I find it has been investigated and discussed comparatively recently by Hon. Bradley T. Johnson, of Richmond, and I find that for a number of years past it was discussed and presented by Mr. Justice Curtis, after he left the bench of this Court, and to a brief extent by Mr. Justice Story. The argument of Mr. Johnson I have laid before your Honors in the "American Law Re- 19
view," published in 1878; the argument of Mr. Justice Curtis I have put in a portion *in extenso*. There are one or two other places where he substantially said the same thing, but I am not aware that there is any addition to be made to the argument he presents in the brief extract from the publication he made a number of years ago in the "North American Review." Now, I do not propose to go over and recite to your Honors the various cases or the various writings which are cited by these gentlemen as 20
sustaining the authorities which they claim. To a certain extent I think there is no controversy now, and none ever has existed, that they are correct and sound. I cannot see that there is any flaw to be found in the reasoning that may be presented upon the side taken by the gentlemen who represent New York; and I am equally free to say that I find no flaw in the reasoning that is presented in the brief, and I suppose will be presented in the argument on the side representing the State of Louisiana. Each

is sufficient in itself. They present the alternative spoken of and commented upon by logicians where one must choose entirely between two separate lines of thought. Now, I propose to state in a very brief way the line of argument adopted by these gentlemen. What they say is that at the time of the adoption of the constitution, prior to the constitution, each State was sovereign in the same sense that any other organized political community is sovereign. In that case the State was charged with the duty and it had the right to protect the individual rights of its citizens in claims against foreign countries. Now, there is some evident display of learning in the statement of that proposition. I am not aware that there is any question about it. I find nothing to the contrary in the brief of my friend on the other side. An organized political community may or may not in any particular instance see fit to adopt and maintain claims of its citizens. I find quotations from prominent statesmen of all countries upon the brief of my friend to the effect that they will not in certain cases, and I find equally strong quotations from equally prominent statesmen that in certain cases they will. In both, it is a question of discretion; in both, it is simply for them to decide whether, according to the lights moving them as a policy for the country they represent, it is desirable that they shall sustain and maintain those rights against foreign countries. No one has ever disputed the right upon the part of a nation. It has been a question of policy and discretion whether they should exercise the power. The power itself has never been disputed.

JUDGE BRADLEY: If a strong nation resolved to proceed against a weak one to collect a claim of its citizens, it will be likely to succeed and recover the money by military execution; but suppose they are equally matched, and both have steel navies of equal strength, would the law of nations * * *.

MR. PECKHAM: There is nothing in the law of

nations to prevent resistance; and on the other hand 25
the action of solving a controversy by war implies, of course, resistance.

JUDGE BRADLEY: In other words, it is a question of power.

MR. PECKHAM: It is a question of might; and I may add, your Honor, that in a certain sense might is not only physical, it is a question of power, of presentation, of argument—the weakness of our side and the strength of the other, we will say. I remember the maxim that force and 26
might rule all things in the world; and the suggestion that your Honor makes applies not only to international controversy, but in early times applied to individual controversy. The first court for the solution of controversies was the court of arms. The answer made is that as between this country and all others relations exist only with the United States, and that the general principle of law is that before a government will assume or undertake to defend the wrongs of their citizens, those citizens 27
must have exhausted the ordinary and proper methods of procedure in the courts. They have done so in this case, and it is only the United States must be brought to account for that failure and that wrong, and be responsible. What remedy the United States would have, would, I suppose, depend upon the very familiar principle of the common law that he who has paid money for the benefit of another has a right of action for the expenditure; and if the United States Government had been made re- 28
sponsible to a foreign government they could on their part turn to the individual state for whose default they have been responsible and enforce their claim.

I was going on to say that from the point at which we say each State had the same rights as any other country to protect the rights of its citizens as against any other, we made this step: the adoption of the constitution. That constitution did not leave any sovereign State. There is nothing so mislead-

29 ing; there is nothing upon which we are so liable to err as in the use of words, and dragging down words from a time when they had a certain meaning to a time when that meaning is no longer relevant, proper or appropriate. The moment you provide as you have provided in this constitution the sovereignty is defeated. I do not propose to go into any political discussion upon the question that has agitated this country and its politicians as to the relative rights of sovereignty between the
30 States and the Union. It has nothing to do with this question. I simply say when you employ the term "sovereign State" you must employ it with the recognized fact that almost all the rights that have been regarded heretofore as sovereign, and as to which the claim has been made for sovereignty and dignity, have been yielded by those States affirmatively and beyond any possible question. They are not in the family of nations. They cannot make any compact or agreement with
31 any other party—neither war nor peace, nor coinage of money, nor the thousand other things which ordinarily accompany the thought of sovereignty in our minds belonging to these States. They have powers of making contracts; they have powers of administration upon the matters that most concern perhaps our daily life; but we are misleading ourselves and following the fancy of a word when we suppose that by the use of the term "sovereignty" we are adding to definition. When they came un-
32 der this Constitution they agreed to provide for the solution of controversies in the courts of the country. Now I want to call your Honors' attention to this feature of it: that always, under all governments, and in all times, there has been provided some tribunal for the solution of controversies between the government and the individual citizen. No one has ever supposed or dreamed that such controversies do not arise. All have agreed that they constantly do and will arise; and from the time of the first organized political community to the pres

ent, tribunals of some character have always been 33
provided for the solution of such controversies,
Some writers say that originally the Queen could be
sued in England and in all cases. If it was not in
courts it was in Parliament, or legislative bodies or
committees—in some way and by some means there
universally has been provided a means of solving
controversies that arose between citizens and the
government.

Now, it is said that when the Constitution of the
United States was adopted it was provided in that 34
Constitution that controversies between the States
and individuals, or other individuals, instead of being
solved by legislative bodies or committees, or boards
of audit, should be solved in a tribunal of the United
States; and then came, under the Constitution, the
first great controversy as to whether an individual
might sue a State. Now what was the issue there?
Why, the profession there was that so far had this
country advanced over prior organized political com-
munities that all controversies between States and 35
the public were to be solved in the same way, and
enforced by the same tribunals as controversies be-
tween individuals. His Honor, Mr. Justice Gray, is
perfectly correct in saying Mr. Hamilton, Mr. Madi-
son and some others took the ground distinctly and
clearly that under the Constitution, as it originally
stood, an individual could not maintain that action.
Other gentlemen equally well known, equally
prominent (all of whose actions are stated fully in
the arguments that are submitted to the Court), 36
who partook in the debates of the Constitutional
Convention, who partook in the debates of
the constitutional conventions of the States
which adopted it, were equally pronounced
in those conventions and in those debates
that it did authorize actions by individ-
uals; and when it came into this Court Mr.
Justice * * * * , who himself was a member of
that commission, gave perhaps—and it may not be
invidious to speak of one rather than another—

gave perhaps the strongest opinion in favor of the view that an individual might sue. The position taken by these gentlemen was this: The Constitution of the United States was not a mere digest. It was not merely gathering the political customs that had hitherto existed. It was a new departure. It meant to provide, and it did provide, that wherever controversies of a judicial nature arose, even between the Government and the citizen, they should be solved in the same way. The position was based upon the idea that prior to the adoption of the Constitution there had been no such thing as responsibility of governments in courts; and that in adopting this language in the Constitution, reference must be had to the prior condition of things, and as to whether such actions might have been brought against the States prior to the formation of any constitution between them; and the inference drawn was that it must be construed according to the condition of things that existed prior to the Constitution. Well, that was the idea that was rejected. Now, as I say to your Honors, you must choose between the two.

What has been the effect of that constitutional amendment taking away from the individual this right to call a State before a court, instead of a legislative committee, to do to him the justice which States always profess themselves ready to do? What effect did that have upon the old right that the State had ceded and given up at the time she adopted the original Constitution with the clause in it that an individual might sue? Why, the argument is that it never could have been intended by the adoption of that amendment that these States that were so dainty and careful of their sovereignty and their dignity should not only have given up the right which they originally possessed, and which they surrendered by the adoption of the constitution of protecting their citizens themselves, but that the citizen ought to have the right given to him by the Constitution of pro-

tecting himself. If, say they, you once concede 41
that the citizen, by this amendment, has lost this right, that very moment the State resumes her right which she had prior to the adoption of the Constitution of herself protecting the citizen. Now, your Honors, I might enlarge upon that for a day. I could add nothing to it. That is the argument: Is it to be supposed that the citizen of a State is to be left absolutely without the right which the citizen of any other political community confessedly does have? Is there nowhere, either in State, or United 42
States, a political entity that can take up the wrongs of this citizen and prosecute them somewhere and in some way when that right confessedly exists in every other political community in the civilized world? Can it be said that a citizen of the United States, or of one of the United States, is to-day, under this Constitution, without any political entity capable and charged with the duty of protecting him in his rights? We submit, sirs, that when the constitutional amendment was adopted taking away 43
from the individual the right to prosecute in the State Courts, or the United States Courts, by the very fact that it was taken away from him it was restored to the State to protect him as it might protect him before.

JUDGE * * * * * * * *

MR. PECKHAM: I would regard the assignment, sir, as a matter of very little account one way or the other. It is a right which the State has to enforce
the claims of her citizens. Of course, in claims of 44
this character an assignment is requisite to show good faith, and putting the State in a situation where it might not go through the extremely disagreeable performance of attempting or assuming to protect rights which after all did not belong to the citizen. That aspect of the case is alluded to by Mr. Justice Curtis in his opinion. He says it can hardly be supposed that a Court would require a State to prove it held the evidence of these claims or obligations. The fact that it makes the claim—that dig-

45 nity of it as a sovereign State—the fact that it makes the claim is sufficient, if it can stand in a position where it can give acquittance to the debtor. I do not think there has been any suggestion of the necessity of an assignment. I am not aware of it. It is claimed that in intercourse with individuals, that whatever rights may belong to an individual so far as a foreign State is concerned, belongs to the State of which the individual is a citizen. There is only this aspect of the case in
46 which an assignment strikes me as being of force. I do not know of any principle by which a debtor can inquire in any further degree into the title of a creditor making a claim than to be sure that if he pays it he gets a legal and valid acquittance. Whether the creditor may hold it in trust or in fraud are matters of no importance, so long only that the debtor, when he pays, is relieved from the possibility of having to pay again. That, certainly, is the law of the State of New York. I presume it is the
47 law of the State of Louisiana, because in the State of Louisiana there has never existed the difficult element of the common law which declines to recognise an assignment of a chose in action. The State of New York, in cases which I have cited, holds directly that so long as between assignor and assignee there is a valid assignment so that the assignee may give acquittance, there is no right or power on the part of the debtor to inquire. Now, that, as affecting the case, would make it important
48 on the question of assignment, because, if there be an assignment here, a holding of these coupons by the parties making this claim, so that, upon payment, they may deliver it, or, upon partial payment, they may indorse, and nobody else can make any claim, why then this State is in the same position as any other party; and you have to come to the absolute position that this State is incapable, under any circumstances, or under any aspect of the case, of holding or owning this contract, before you can say the State cannot maintain the bill.

Now, there is this other feature in the Constitution of the United States, which I frankly confess to your Honors is a feature that strikes me as vastly more difficult for us to meet than those which I have been discussing. The mere question of jurisdiction of Courts, the mere matter of the right and power of the Court to decide between these parties, it seems to me, is beyond any possibility of discussion, because the Constitution says, in so many words, in direct language, "controversies between States." Now, it is a controversy between States, or a controversy between a State and citizens of another State. Your Honors made some suggestion as to the question whether there had ever before been presented in this Court a controversy upon a contract. I will say this: that the original contention here was, that although this Court would have jurisdiction in controversies *ex contractu* it had none in controversies concerning boundary or sovereignty, because they were of a political nature; and that was the very contention in all the boundary cases, that they involved questions of a political character. Sovereign rights, as distinguished from property rights, and the contention was that the Court had no jurisdiction to decide upon questions of a political character. You decided that you had; and would not it be most extraordinary now after a controversy in numerous cases strongly contended, has been settled to the effect that you had jurisdiction in questions of a political character, to turn around and say that they are the only cases of which you have jurisdiction. The first cases that were brought into the Court were all of them *ex contractu*.

You have decided that where a question was political in its character and also judicial, you would not refuse jurisdiction of the judicial controversy because it was political. Your Honors will find in my brief, without my turning to it at

53 the present moment, a number of citations from your opinions in various cases where you have held this. It would seem to be urged here as a reason why you should not allow this, that controversies affecting boundaries, which are certainly controversies of a political character, are the only controversies over which your Honors have jurisdiction. Now, the first cases that were brought into this Court were all of them cases *ex contractu;* some seven or eight; prior to the Chisholm case, and prior
54 to the amendment preventing individuals from suing; and since that time there has been no suit brought in this Court in that way.

Now, your Honors, I do not know that I can add, or care to add, anything on the right of a State to bring this suit; and I shall proceed to discuss (supposing the States have the right) whether the parties are entitled to the relief, and what the relief should be. I should say before commencing, however, that the clause of the Constitution which pro-
55 vides that no State shall enter into any compact with another State * * * * * because, as I said, the question of jurisdiction depending upon the language of the Constitution, which says it shall have jurisdiction of all controversies, it is putting the question really upon the basis upon which it should stand for presentation, which is having jurisdiction and entertaining this question, still has this State stated a cause of action in this complaint? Has she under
56 the Constitution the right to acquire this cause of action, and the right to ask the Court to enforce it? It is a question of whether this complainant has this right. Now, if the word "agreement" is to be construed in the ordinary sense of the common law term, why the State of New York or the State of New Hampshire could not have agreed originally to lend to the State of Louisiana the money and have taken the bonds from her. But the question is: Is the word "agreement," as used in the Constitution,

intended to cover that kind of agreement, or is 57
it intended to cover only an agreement of a similar character to those that are repeatedly referred to? Now, I have found one case in the State of Georgia where that question is directly involved, and where they say that the word agreement means "compact or treaty, or agreements in the nature of and similar to compact and treaty." I say there is one case in the State of Georgia which holds that States may enter into contracts and agreements in the ordinary sense of the common law term, and that the words 58
in the Constitution "compact or agreement"—the word "agreement" should be construed the same as the word "compact," and as referring to the names signifying arrangements made between several States. I find but a single case where those words come under judicial construction and interpretation, and that is in the case in Georgia; and it was there held that they did not apply in the ordinary common law sense of the word "agreement;" and I find also that construction is adopted by Mr. 59
Story in his commentaries.

Adjourned to April 19th, 1882.

Mr. Peckham: If your Honors please, in the few remarks I shall further address to the Court, I propose to discuss the cases as presented in the two cases on appeal by writ of error.

Your Honors will find as an appendix to my brief 60
in the State case the opinion in the first place of Mr. Justice Billings, who dismissed the bill in the injunction case below, and also denied the application for a mandamus; and also the opinion of Mr. Justice Munroe, in the State Court, who held on intervention on our part, that the law of which we complained was unconstitutional, and that we were entitled to the relief we asked. That view, as I said yesterday, was reversed in the Supreme Court of the State on appeal, and their opinion I have not got. Your

61 Honors will find in the brief that I have presented in No. 845, in the appendix, the opinion of Mr. Justice Pardee on the motion for a preliminary injunction in a precisely similar case to that here on appeal. They present all the judicial action on the subject I know of, with the exception of the opinion of the Supreme Court of the State, which I have not obtained, and also excepting the dissenting opinion of Mr. Justice Billings in this last case, but that is of the same precise character as his opinion in the
62 other case.

Now, I may remark with regard to the opinion of the Supreme Court, that it stands in this position: Judge Munroe, who decided the case first, I believe, was a judge who had been elected or appointed under the old Constitution, prior to the Constitution of 1879. The judges of the Supreme Court were appointed under the last Constitution by Governor Wiltz, who, at the same time, was the principal mover for the adoption of the Constitution in the
63 convention. That suit in the State Court was brought by a Mr. Newman, who was a general creditor of the State, for a mandamus against the Treasurer to pay a claim he had which was not of the character of these bonds, and in that suit we intervened.

JUDGE * * * * : The Court entertained this suit against the officers of the State for the purpose of compelling them to pay that debt.

Mr. PECKHAM: Yes, sir; the State Court enter-
64 tained the suit, but on the intervention held that the law under which Newman proved his claim was unconstitutional, inasmuch as the law by which we now claim showed these funds were meant for us. The Supreme Court of the State reversed that, and held that the application was well made by Newman, for mandamus, and awarded him mandamus against the State officers requiring them to pay his claim out of this fund. Now, I am informed by a letter from there, that they have made some provision—I do not know what it is—for the retention of

sufficient of these funds in the hands of the State 65
Treasurer to pay the claim on these bonds, should this Court award that we re entitled to the payment of the coupons. Well, there are some eighty odd thousand coupons, and they are but a fraction of the bonds which these parties really own.

Now, your Honors will find in the brief that I presented in the State Case, I think, all the Acts of the State of Louisiana to which there is any occasion to refer, and they are set out in full. The first is the Act, under which we claim, of 1874, Act 66
No. 3; and we have followed that by the constitutional amendment in the same relation; and we have followed that by the Act of the State of New Hampshire under which this special proceeding is brought; and we also have the State debt ordinance, which is the proceeding under which the defendants justify their refusal to appropriate the money as we ask. I ought, perhaps, to say, as some of your Honors may be more particularly familiar, as I was, with the common 67
law proceedings in common law States, that in the mandamus case here, No. 845, there are certain findings of the Court, and there is no exception to those findings, as we would have in the State of New York, in order to raise a question for the appellate Court. When I first opened that record it struck me as not entirely regular, according to my notion, and I wrote to New Orleans in relation to it, and am informed by my counsel there that it is not in accordance with the practice of their State to file 68
any exceptions. It is an unknown proceeding; and that the writ of error where the case discloses the findings of the Court brings up precisely the same questions as in the State of New York if exceptions had been filed.

Now, I want to call your Honors' attention to this, in order that the precise question raised here will be seen. To some of your Honors the act is familiar; to some of your Honors who have more recently come into the Court it may not be familiar.

69 It is the same act that was involved in the case of the Board of Liquidators against McComb. This act provides for the funding of the then existing obligations of the State of Louisiana by bonds, pro vision for the issue of which is made by this act.

The fifth section provides for the issuing of these bonds, "Said bonds shall be used for no other purpose or purposes than is authorized by this act." I would also call the attention of your Honors particularly to section six. I do not know that it has any
70 precise legal bearing, but perhaps it may have; it certainly has a very strong moral bearing upon the question. This section provides that notice of the adoption of this act shall be published in one or more journals in New Orleans New York, London and Paris ; so that in the invitation that Louisiana made to the holders of her debt at that time existing. by which she invited them to remit forty per cent. and to take these bonds in its place, she published to the world so far as pos-
71 sible the terms of the act under which she proposed to make this reduction, with the peculiar and I think unprecedentedly strong provisions to secure the payment of the bonds. Now, section seven provides for the levying and assessment of a tax, and "the revenue derived therefrom is hereby set apart and appropriated to that purpose and no other," and that it shall be deemed a felony for the fiscal agent or any other officer of the State, or the board of liquidators, to divert the said fund from its legitimate
72 channel as provided in the act. There is a further provision which bears strongly upon a certain aspect of this case, that if in any one year there is a surplus of revenue after paying the interest on these bonds that that surplus shall be devoted as a sinking fund to retire the principal of the debt. That same seventh section provides that the tax shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest. Section eleven provides that "each provision of this act shall be and is hereby declared to be a contract

between the State of Louisiana and each and every holder of the bonds issued. There is another section providing that no Court or judge should have any power to enjoin, &c. Now, at the same time that act was passed another act was passed providing for the submission to the people of the constitutional amendments. Those amendments are set out on the eighth page of my brief, but I will read them : 73

"No. 1. The issue of consolidated bonds authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor: to secure such levy, collection and payment the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury. 74 75

"No. 2. Whenever the debt of the State shall have been reduced below twenty-five millions of dollars the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased; and this rule continue in operation until the debt is reduced to fifteen million dollars, beyond which it shall not be increased, nor shall taxation for all State purposes, excepting the support of public schools, ever exceed twelve and a half mills on the dollar of the assessed valuation of the real and personal property in the State, except in case of war or invasion. 76

77 "No. 3. The revenue of each year derived from taxation upon real, personal and mixed property, or from licenses shall be devoted solely to the expenses of the said year for which it shall be raised, excepting any surplus remain, which shall be directed to sinking the public debt. All appropriations and claims in excess of revenue shall be null and void, and the State shall in no manner provide for their payment."

Now, these constitutional amendments were
78 adopted and became a part of the Constitution of Louisiana, under which these bonds were issued.

The State debt ordinance, which is part of the Constitution adopted in 1879, provides that the money in the hands of these officers, raised by the tax levied under that act and appropriated to the payment of the coupons falling due on the first of January, 1880, shall not be so used, but shall be diverted from that purpose to which it was appropriated by this act, and by these constitutional amend-
79 ments, to the general purposes of the State government. Under that and a law passed pursuant to it, Newman applied to have his claim paid, amounting to about $80,000.

Now, your Honors, I am not aware that at any time or anywhere, in the very considerable litigation that has been had under this Constitution of 1879, and I believe I have taken part in all of it, either directly or indirectly, I am not aware that there has been any intimation anywhere by anyone that this
80 act was constitutional—that the Constitution was constitutional. It is in direct, absolute opposition to the terms of the Act of 1874, under which the bonds were issued. But it has been claimed that, although unconstitutional, it raised a political question; or, in other words, that its unconstitutionality applied to the political or legislative power of the State of Louisiana, and that, if they failed to heed the injunction or warning of the constitution of the United States in that respect, there was no power to compel them to. Now, in regard to

this question I propose to follow the same plan that 81
I did yesterday in regard to the others. I do not propose to weary this Court with a detailed examination of cases, or with reading the statements or opinions which seem to me to support conclusively the views that I shall submit to the Court. I propose simply to state the views that seem to me to be supported completely and thoroughly by the facts and the cases, familiar to the Court, probably—at any rate they are very readily accessible; and whether I am supported by them or not, I leave to 82
your examination to determine.

The suit of the State of New Hampshire, assuming for the moment that the State of New Hampshire has the right to sue, is for precisely the same purpose as that of John Elliott in No. 856. It is a suit to restrain the officers of the State from diverting this fund from the payment of coupons to which the law of 1874 appropriated it, to the general purposes of the State, and whether we can have that relief or not as an individual, aside from the right 83
of the State to sue, is what I am about to state to the Court.

Now, I find this principle plain and clear, and not controverted; that where a duty is imposed upon an officer (state or national it makes no difference), and an individual has an interest in the execution of that duty by that officer, process from the Courts will go to compel the execution of the duty. I also find this principle, as to which there is no controversy: that where a discretion is vested in 84
an officer, or a board, or a department, and the officers exercise that discretion in a way not acceptable to the party having an interest in its exercise, that Courts will not interfere. Now, those are two principles to a certain degree conflicting; that is, they present two opposite sides of a question, as to which there is no dispute by anyone, and the question is, within which of those two principles is this case embraced. Now in the case where we ask for an injunction, the law says in so many words:

85 "This fund when raised shall be for the purpose of paying the coupons on these bonds." There is a provision in that law for ascertaining and deciding certain questions that may arise within the discretion of those officers, and certain of those questions are relegated to the State Court for decision—the ownership of the debt, whether there is a class to be funded; but the law provides in the strongest possible terms that human language is capable of furnishing that those moneys shall be used for the pur-
86 pose of paying these coupons, and for no other purpose; and what I submit to your Honors is that there is no possible room for discretion. There is no possible way to say that these officers can invoke the principle of discretion to authorize their diversion of the fund appropriated by this act for any other purpose than the payment of these coupons. Now, there are vast numbers of cases that have been decided upon points of this character. I shall submit to your Honors this principle, that I find laid down
87 in the English cases. It places it in such clear definite language that it seems to me the question cannot be presented better in any other way. Numberless applications have been made to the English Courts for writs of mandamus against officers of the Government to pay claims to parties prosecuting the writs. Very many of them have been refused. The Courts say this in regard to it: "If the appropriation by Parliament has been to a department, giving the department the discre-
88 tion of spending the money in the way that it likes, no writ will go; if, on the other hand, there has been a parliamentary grant appropriating the money from the treasury for a specific purpose to a specific person or ascertainable person, or class of persons, so that the discretion has been exercised by Parliament, and is not left to the department, the writ will go. Now, I want to call your Honors' attention to two or three lines that I have quoted from the English cases that illustrate it. On page 48 of my brief in the case of Murray against Earl

Clarendon (L. R. 9 Eq. cases, 20), Lord Romilly, M. 89
R., says:

"But the difficulty, or rather the impossibility, of treating it as a trust fund is this: That it is paid for the general purposes of the office. It is not paid in trust for any particular person. The case that was cited was to this effect: That if Parliament votes a sum of £1,000 for John Smith, and the treasury devote in their books the payment of that sum to other purposes, then a mandamus will lie to the treasury to order them to pay that £1,000 to John 90
Smith. But there is nothing of the sort here. Parliament has merely voted certain sums to her Majesty, and of these sums £600,000 are to be applied to the foreign office. The distribution of that amount is left to the officers of the foreign office to apply, * * * * and there is nothing whatever to connect the plaintiff with a penny of this money in any respect."

The distinction is very clearly stated in another case that I have referred to on the next page by 91
Chief Justice Cockburn. He says:

"Therefore the question comes to be whether the Lords Commissioners of the treasury, when this money gets into their hands are bound to apply it as the servants of the Crown, or as the servants of Parliament, who vote the money."

And in the same case Lord Cockburn says:

"The question remains whether there is any statutable obligation cast upon the Lords of the Treasuary to do what we are asked to compel them to 92
do by mandamus, namely, to issue a minute to pay that money; because it seems to me clear that we ought to grant a mandamus if there is such a statutory obligation."

Now, a mandamus has been granted in several cases in England, which are referred to; and it is granted always where there is precisely what there is here, a statutable obligation upon officers to disburse money in accordance with the provisions of an act of Parliament or of the Legislature.

93 Now the case of Twycross agst. Dreyfus has been commented upon by their Honors below, and by counsel. That was a case where an effort was made in England to sieze moneys in the hands of an agent of the Peruvian government in order to apply them to the payment of Peruvian bonds; the money being the proceeds of guano, and the endorsement on the contract expressing that the guano of the government was to be applied exclusively to secure these bonds. Your Honors will notice in that case there
94 was this distinction: In the first place, the action was brought in a foreign country, it was not brought in the courts of the power that had made the obligation, or in the Courts of the power that had created the officer and imposed on him the duty. It was brought to seize upon funds in the hands of a mere agent in a foreign country. Your Honors will notice this difference also ; that in that case there was nowhere any obligation imposed in any way upon this agent having these funds to em-
95 ploy them as asked for by the complainant. There was no obligation anywhere. There was a bond given by the Peruvian Government, and on the back of that bond was endorsed that the revenues from guano were applied or secured for the payment of that bond ; and the suit was brought against this agent, in whose hands the money was placed for other purposes, and not with any direction to apply it to the payment of these bonds. It is substantially a mere action against a foreign government in a
96 foreign state. But if the money had been paid to that agent by the Peruvian Government with directions to him to pay the money or use the money for the purpose of paying the bonds, I apprehend there would have been a different decision. Then that agent would have held this money as the trustee of the bondholders under instructions from his principal to apply it in a certain way.

Now,I want to call your Honors' attention to one case in which this question has been before this Court under this same law precisely. In the case

of the Board of Liquidators against McComb in 2 97
Otto, the action was brought by holders of these same bonds. It was brought against these same defendants. It was brought under this same act. It was brought for the purpose of enjoining the action of these same defendants, which would have been justified by an act, which was passed subsequently to 1874, had that act been constitutional. This Act of 1874 provided that the debt should not exceed fifteen millions, and that parties who had claims prior existing should fund them at the rate of sixty per cent. 98
The Legislature then passed an act subsequent to that time, providing that holders of different classes of securities might come in and have them funded in bonds, issued under this act at par; and the officers of this Board, in compliance with the Act of the Legislature were about to fund this other class of indebtedness at par in these same bonds, when the bill was filed to enjoined them. Consequently this Court has held upon this very law with regard to these very parties, that where a law of the State 99
of Louisiana unconstitutionally provides for the disposition of the bonds in hostility to the Act of 1874, it will be enjoined. Why not? The mere funding of a different indebtedness of the State of Louisiana at par was the sole matter complained of in that case; but the matter that is included here is the absolute diversion of all the money raised under these statutes, for a different purpose. Now, how is this to be justified under a law or a constitutional provision, and give any effect whatever to the provi- 100
sion of the Constitution of the United States that the obligation of a contract shall not be impaired? This assumed law or constitutional provision of 1879 of the State of Louisiana, I submit must be regarded precisely, by this Court, in the solution of this question, as if it did not exist, as if it had not been passed at all. The law of the State of Louisiana, they say, instructs these officers to do what the law as passed by that State before said they should not do. But what we submit is that there is

no law, no instruction anywhere in the State of Louisiana in any degree in hostility or contravention of this law of 1874, because nobody had authority to pass such a law. Would your Honors hesitate a moment? Would the State Courts of Louisiana hesitate a moment? Has not their decision in the Newman case shown they would not hesitate a moment? If this law or constitution of 1879 had not been passed, and if the sole reason why these individual men said that they would not execute this law is because they thought, in their own executive discretion, that it was not best to execute the law, would your Honors hesitate to say to them by *mandamus* or injunction "you shall?" No one has so hesitated heretofore. They say that the constitutional convention, or an Act of the Legislature has instructed these men not to do as the law of 1874 provides they shall do. But the constitution of the United States, which was adopted and made substantially a part of the law of Louisiana when she came into the Union, says this: "The power to repeal a law of the State, which is a contract, does not exist in the legislature or in a constitutional convention, or even in the hands of the people of the State." It exists, and exists nowhere else but in the people of the State of Louisiana acting through their legislative assemblies united with the requisite number of the legislatures of the other States, in order to repeal it in accordance with the terms of the constitution of the United States. That is the power, that is the authority, and that is the only power that has authority to say that a law which in itself makes a contract shall be repealed. Now, I cannot see that there is any distinction to be drawn in the two cases of saying, on the one hand, to the State of Louisiana: "You shall not issue these consolidated bonds to persons holding a different class of indebtedness except at sixty per cent, and not at par," and saying to them, upon the other hand, in the case we now bring before you: "You shall not divert the sum that you have solemnly

pledged in the form and shape of a contract, advising creditors in other States, advising us before we took the bonds, that it was a contract which you had no power to change. You shall not do that except that you do it in conformity to the law of the State of Louisiana as promulgated by her legislature, but of the law as expressed in the Constitution of the United States, and according to the form therein prescribed." 105

Now, your Honors, that is the simple question, for the solution of which we ask your attention. 106

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108

109 ARGUMENT OF

WHEELER H. PECKHAM,

IN REPLY.

In the few remarks I have to make in reply, I shall address myself exclusively to questions arising in the individual cases, or those No. 845 and 856, leaving for the counsel for the State of New York
110 to answer the argument of the counsel for the respondent, so far as it relates to the question of the right of the States to sue.

The counsel for the respondent, with respect to the mandamus case, or No. 845, said that it was a case of which the State Court had no jurisdiction, and which was removed to the United States Courts, being equally without jurisdiction.

I submit that the learned counsel is in error in both positions. True, in the case of Hart
111 vs. Burke, the Supreme Court of Louisiana, in a certain sense, held that the State Court had no jurisdiction to hear the mandamus; but that was only on the ground that they had not jurisdiction to hold the Constitution of 1879 unconstitutional as conflicting with the Constitution of the United States.

The Supreme Court of Louisiana has never held that in a case like that presented in No. 845, and which did not involve this constitutional question,
112 they had not jurisdiction to award mandamus to State officers. On the contrary, in the late case of Newman against Burke, decided within the past few days, and a copy of the opinion in which I have sent for and will furnish to the Court so soon as received, the Supreme Court of Louisiana directly held that they had power to, and did, award mandamus to these identical State officers to pay out this identical fund, but to persons creditors of the State, not by bond; and awarded it on the ground that by the Constitution of 1879 the provisions of

the Law No. 3, of 1874, were repealed, and that the general creditor was, consequently, entitled to this fund preferably to the bond creditor. 113

It is thus clear, beyond question, that so far as the writ of mandamus is itself concerned, and passing over the constitutional questions involved in this case, the Courts of Louisiana, including the Supreme Court, to the very last moment, have always held, and now hold, that mandamus will go, and is a proper remedy.

The learned counsel for the respondent, however, suggests that the Circuit Court of the United States had jurisdiction of cases removed from the State Court only to the same extent, and in the same manner, as if such case had been originally a case in the Circuit Court; and then argues that the writ of mandamus is, in the United States Courts, an ancillary writ only. 114

I submit that, in that point, the learned counsel is again in error. True, at a very early period in the jurisprudence of this Court, it was held that the United States Courts had no original jurisdiction to issue mandamus, and that the writ was ancillary only. The first case in which it was so held is that of McIntyre against Wood, 7 Cranch, 504. The same doctrine was subsequently held in M'Clung against Silliman, 6 Wheat., 599. 115

In those cases the jurisdiction was denied, on the ground that Congress had not given to Circuit Courts all the judicial power which by the Constitution had been vested in the United States. It was particularly emphasized that Congress had failed to give jurisdiction in cases arising under the law and Constitution of the United States, as provided in the Constitution; and it was pointed out that, in such cases, Congress had provided for an appeal from the State Courts to the Supreme Court of the United States, under the twenty-fifth section of the Judiciary Act, and had made no other provision for such questions being passed upon in the United States Courts. 116

117 In 1875, however, the act was passed under which the removal in this case was had. By that act jurisdiction was *in terms* given in all cases arising under the constitution and laws of the United States; precisely the *legal* provision in accord with the constitutional grant, which the early case above cited found did not exist under the original Judiciary Act , in Sections 11 and 4.

Under that law the Circuit Courts of the United States have original jurisdiction to issue man-
118 damus in particular cases; and under that law the removal, from a State Court, of a mandamus proceeding to the Circuit Court of the United States, has by this Court been held to be legal, and its refusal to be error.

In Railroad Company against Mississippi, 102 U. S., 135, the precise question was whether a mandamus proceeding commenced in the State Court and attempted to be removed to the United States Courts by the defendant, was such a suit or pro-
119 ceeding as was contemplated by the act, and as should have been removed. Mr. Justice Miller in that case, dissented from the majority of the Court, which majority held that the case should have been removed. The dissent of Mr. Justice Miller, however, was only upon the ground that the Act of 1875, referred to cases where it appeared on the plaintiff's own papers, or showing, that the case was one arising under the laws or the Constitution of the United States; and that where,
120 as in that case, questions under the law and Constitution of the United States only arose upon the defendants' return to the mandamus, the case was not one for removal. The case at bar is one where it appeared upon the application for the mandamus itself that it was a case under the laws and Constitution of the United States, for the Constitution of 1879 of Louisiana was set out in the petition for mandamus, and the invalidity of the Constitution was asserted on the ground of its conflict with the Constitution of the United States.

The defendants in their return also raise solely 121
the question as to whether that Constitution of 1879 was valid or invalid under the Constitution of the United States.

Thus we find that, as well by the dissenting opinion as by the opinions of the majority, this case is one of which the United States Circuit Court had jurisdiction, and which was properly removed from the State Court to the Circuit Court of the United States.

I have but a few words to add, upon another 122
branch of the case. The learned counsel for the respondent made no answer to the claim in the individual cases of the appellant and plaintiff in error, other than that the contract evidenced by the bonds and by the law and Constitutional amendment of 1874, of the State of Louisiana, constituted what is know in civil law as an imperfect obligation; that it was not a perfect obligation, and hence was not justiciable in any Court of law or equity, and the claim could only be made or prosecuted *in forum conscientiae.* 123

To this view we answer: that, conceding, for the sake of the argument, and so far as it may affect these individual cases, that a mere bond of the State is an imperfect obligation within the meaning of that term as used by the civil law writers; yet that this case does, within the meaning of those same writers, present a case of *perfect* obligation. In all cases of imperfect obligation, and in all cases of a mere naked bond or promise upon 124
the credit of a government, there has never, at any time, been any legal remedy to the promisee or holder of the bond. If there be provided by law, at the time of the making of the contract, any remedy whereby the holder of the bond or promisee can enforce the same in any Court of civil jurisdiction, the obligation then, so far as that remedy is provided, is a perfect obligation, and there exists a legal sanction which, according to the civil law writers, is the

125 one element that distinguishes a perfect from an imperfect obligation.

Now, in such a case as that presented by this law of 1874, of Louisiana, there never has been a day for the past two hundred years when a remedy in a Civil Court did not exist in every State in this country and in the Courts of England.

From the time of the case of the Bankers; to the time of the decision in the Supreme Court of Iowa, of the case cited in our principal brief, and even to
126 the present day, the Courts have uniformly held that where, in aid of or as collateral to, or as part of the bond and promise of a government to pay a sum of money to an ascertained class or individual, a fund has been levied and appropriated and an officer designated and charged with the duty of its administration, mandamus or injunction would go at the suit of the party injured. That right existed whether the Sovereign was willing or unwilling, at least so far as Sovereignty was vested in the Ex-
127 ecutive of the Nation. The writ would go in England, notwithstanding the opposition of the Crown, provided the grant had been definite by Parliament to the individual claiming the writ.

In Iowa the writ was awarded, notwithstanding the opposition of the Executive branch of the government, and in the cases in this Court to which we shall immediately hereafter allude, the same remedy was awarded *in invitum* the Executive of the States of Texas and of Louisiana.

128 Now, whether in the mind of civil law writers Sovereignty was to be found exclusively in the Crown, or Executive, or in Parliament, we are not advised. Such questions under the Constitution of Governments other than those of England and America never arose. It seems clear, however, that when the civil law writers speak of imperfect obligations as being those that have no legal sanction and which cannot be enforced in the Courts, they speak with reference to obligations which at the time they are made under and pursuant to the laws

which authorized them, cannot be enforced, and not 129
with reference to any such questions as arise only
in this country where an attempt has been made to
repeal laws which gave a legal sanction, which re-
peal conflicts with the organic law of the land.

I therefore submit that under the strictest con-
struction of the civil law rule of perfect and imper-
fect obligation, this obligation of the State of Lousi-
ana was and became a perfect obligation so far as
concerned the right of the holders of bonds to en-
force the specific levy and appropriation made in the 130
Act which authorized the bonds and upon the faith
of which we and all persons were invited to pur-
chase the bonds. That the State of Louisiana itself
understood that it was offering a perfect obligation
to these creditors would seem beyond dispute. It
makes the levy and appropriation for all time, so
far as may be necessary to accomplish the payment
of these bonds. Those sovereign acts were done and
completed at the time when the bonds were offered.
What was left was the mere ministerial duty upon 131
the part of those appointed to execute the trust re-
posed in them. Further than that the State of
Louisiana in express terms declared that the bonds
and every clause and section of the act is and shall
constitute a contract, the obligation of which shall
not be impaired, and by advertisements made known
to the capitalists of the world, the peculiar and
stringent terms of the contract she offered them.

The words used in that act, "Contract, the obli-
gation of which shall not be impaired," of course 132
refer to constitutional provision in that regard in
the Constitution of the United States. They refer
also to the well known series of adjudications in
this Court, holding that that constitutional pro-
vision was binding upon States as well as in-
dividuals.

Beyond question, the view taken of this question
by the State of Louisiana, was that it was a perfect
obligation; and equally beyond question that view
was held by the persons who purchased these bonds

133 and who now seek relief. It would be strange, indeed, if the Court should hold that a view of the contract which in its initiation was held by both sides is not the one which should be enforced.

Turning now for a moment to the decided cases: I submit that all cases decided in this Court against municipal corporations awarding mandamus for the collection of taxes for payment of their bonds, are direct authority for the position we take. In those cases the laws of the States repealing the delegation
134 of the power to tax have been held unconstitutional.

They were unconstitutional because, although the power of taxation is a sovereign power and belongs exclusively to the States, and although they can not be controlled in its exercise by the general government or by the Federal Courts, yet having allowed that power in a specific case to become a part of the sanction of an agreement by a legal political division of the State, this Court said that to allow it to be repealed after others had acted upon its faith
135 would impair the obligation of the contract.

Nor do I think that the fact that in those cases the municipal bodies had power to make a perfect obligation, or one that could be enforced by judgments, makes any difference. Their power so to do was derived from and a part of the political power of the State. Certainly, if the State itself had no power to make a perfect obligation it could not delegate the power.

In fact all municipal powers were first and prim-
136 arily exercised by the State itself. In England local improvements of all kinds were first made by the State, the State enacting laws for that purpose and providing certain Commissioners to execute the laws, and these Commissioners were held justiciable at the suit of the Attorney-General or any party injured. Subsequently, municipal corporations, which in their early history in England were mere private corporations, became the donees of the power to execute local improvement acts, and in that way became justiciable in the same way as the Commis-

sioners for that purpose appointed, at first had been. 137
Now, although in England the Crown was not suable on any of these contracts for local improvements, yet the Commissioners or the corporate municipalities were suable in all cases, either of non-action or of diversion. (See cases cited on p. 57 of principal brief). True, in our own country, municipalities have generally had the same powers and been liable for the same obligations as English municipalities after the Act of 1835 for Ireland, and 1840 for England. Nevertheless, it is familiar law in our country 138
that these same local improvements may quite as well be done by the direct action of the General Government as by the intervention of local corporations, and that when so done the persons appointed to execute them are justiciable in the same manner as corporations

People vs. Flagg, 46 N. Y., 401.

But we need not rely upon municipal corporation cases, and we need not go into any detailed exami- 139
nation of the history of municipal corporations in England or this country, as showing the origin of their liability and its political character, and the sanctions attached to it. We have the recent decision of this Court in two cases, which it seems to me beyond question sustain our view.

The learned counsel for the respondent has conceded in his brief the application of the clause of the Constitution "to contracts which execute themselves when made," such as deeds and charters. 140
But he denies its application to contracts executory in their nature, and which are not complete in execution as well as in promise at the time of delivery.

The case of Davis vs. Gray was a case of executory contract. The contract between the railroad company and the State was wholly executory. A large part of the discussion by this Court was whether by conditions subsequent the railroad company had not forfeited the right to have the con-

141 tracts executed. The *legal title* to the land remained in the State. The State was about to convey that legal title to other parties, and the act enjoined was the conveyance of such legal title, and the purpose of the injunction was that the railroad company might compel the execution by the State officers of the contract made to it.

True, it may be said in that case that the equitable title was vested in the railroad company, but when that is said it is declaring one of those fictions
142 so abhorrent to the learned counsel for the respondent. Equity, it is said, considers as done those things which are agreed to be done, but in that, equity considers a fiction, for the object of the bill is to compel the doing of the very thing which, in a certain sense, it considers as done. We might say that in the present case, in the same way, equity considers this money as ours; indeed, the very foundation of our bill is that, having been levied and appropriated, this money *is* ours, whether in the hands
143 of the State officers or in the hands of the tax-payers; and we invoke the aid of mandamus and injunction to give us our own, and not the money of the State in the Treasury of the State.

But to pass on to the other case of McComb v. The Board of Liquidators. In that case these same bonds and this same act were necessarily held to be perfect obligations, so far as the provisions of the act were concerned. An injunction was awarded that the State officers should not issue these bonds
144 to other creditors, unless upon the terms of sixty per cent. bond for one hundred old debt surrendered.

If there were no legal sanction; if there were no legal obligation by this Act; if, contrary to the ideas of Louisiana and her creditors at the time, the State proffered nothing but the public faith, nothing but the Legislative or Executive honor, on what basis did the Court then interfere and enjoin, providing that the benefits of the Act should be given only to persons who, like the persons then holding the

bonds, were sacrificing forty per cent. of their 145
claims?

The fact is that this Act was drawn and designed for the express purpose of making a definite levy and appropriation, which should give and include a legal sanction to every holder of the bonds. That was intended by Louisiana. It was by Louisiana supposed that she had so done. It was by the bondholders supposed that Louisiana had so done.

In the absence of the unconstitutional Constitution of 1879, no Court in Louisiana, or in any one 146
of the States, would have dreamed of holding that there had never been provided a legal sanction to the contract as made.

We submit that it would be a downward step in the jurisprudence of this Court, as annunciated through a century, to now hold that no matter what the appropriations and provisions which might be made by the State at the time it received the benefits for which it gave these promises and made its levies and appropriations, they were without a 147
sanction which was protected by the Constitution of the United States, or would be enforced by its Courts.

148